108 U.S. 228—288

108-228

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~462.~~ 179

THE MEMPHIS AND CHARLESTON RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TENNESSEE.

FILED FEBRUARY 7, 1880.

SUPREME COURT OF THE UNITED STATES

No. 462.

THE MEMPHIS AND CHARLESTON RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TENNESSEE.

INDEX.

	Original.	Print.
Caption	1	1
Summons	1	1
Declaration	2	1
Amended declaration	10	4
Pleas of defendant	27	9
Pleas and demurrer	30	10
Replication	31	11
Cause set for hearing	34, 35, 36	12
Jury and trial	37	13
Verdict	52	17
Judgment	55	18
Supersedeas bond approved	57	19
Bill of exceptions	58	19
Writ of error	128	45
Bond	129	46
Citation	131	46
Clerk's certificate	132	47

1 United States circuit court, western district of Tennessee.

Proceedings had in the circuit court of the United States for the sixth judicial circuit thereof, western district of Tennessee, at a regular term of said court, begun and held for its , A. D. 18 , at the Federal court-rooms in the city of Memphis, on, to wit, the day of , 18 , and days previous and subsequent thereto, in the following cause:

UNITED STATES
vs. } No. 2429. Law docket.
MEMPHIS & CHARLESTON R. R.

The President of the United States of America to the marshal of the western district of Tennessee, greeting:

You are hereby commanded to summon The Memphis and Charleston Railroad Company, a corporation existing under and by virtue of the laws of the State of Tennessee, and a citizen of the State of Tennessee, if to be found within your district, to appear before the judge of the circuit court of the United States, in the sixth circuit, for the western district of Tennessee, at Memphis, in said district, on the fourth Monday in November next, and then and there to answer The United States of America in a plea of debt, to the damage of the said plaintiffs (as they say) thirty thousand dollars. Herein fail not, and have you
2 then and there this writ.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court, at said Memphis, this twenty-first day of November, A. D. 1877, and the 102nd of American Independence.

[SEAL.] HORACE E. ANDREWS, *Clk*,
L. H. PILLSBURY, *D. C.*

(Endorsed:) No. 2429. The United States vs. Memphis & Charleston Railroad Company. Summons. Returned to November term, A. D. 1877. W. W. Murray, U. S. attorney. Returned filed 21st day of November, A. D. 1877. Horace E. Andrews, clerk, L. H. Pillsbury, D. C.

Service acknowledged this 21st November, 1877.
HUMES & POSTON,
For M. & C. R. R. Co.

UNITED STATES OF AMERICA,
Western District of Tennessee:

In the circuit court of the United States, within and for said western district of Tennessee, in the sixth judicial circuit of the United States, November term, A. D. 1877.

The United States of America, plaintiffs in this suit, by W. W. Murray, their attorney for said district, complain of The Memphis and Charleston Railroad Company, a corporation existing under and by virtue of the laws of the State of Tennessee, and a citizen of said
3 State, having its situs and place of business at Memphis, within said State and district, defendant in this suit, which is in court by summons of a plea, that it, the said defendant, render unto the said

plaintiffs the sum of thirty thousand dollars, which to the said plaintiffs the said defendant owes, and from them unjustly detains. 1. For that whereas heretofore, to wit, from the first day of July, A. D. 1862, continuously, to the first day of December, A. D. 1865, in said district, to wit, at said Memphis, said defendant owned and possessed, and then and there, during all said time, had the care and management of a certain railroad, to wit, The Memphis and Charleston Railroad, the said defendant and the said railroad, during all said time, having been engaged in the employment and business of transporting passengers and property for hire and in transporting the mails of the United States; and whereas the net earnings, profits, incomes, and gains of the said railroad company, from said first day of July, A. D. 1862, to the first day of December, 1865, amounted to a large sum of money, to wit, $300,623.83, which said sum was by the said defendant, during the said time, used and expended in the
4 payment of the interest on the bonds of said railroad company, and in the payment of certain coupons representing such interest, and in the further payment of certain dividends declared by the said railroad company to be due and payable to the stockholders thereof as part of such net earnings, profits, incomes, and gains, and also in the construction and improvement by the said defendant of its said railroad, beyond and in addition to the condition of the said railroad, on said first day of July, A. D. 1862, thereby and because of such net earnings, profits, incomes, and gains so used and expended by the said defendant as aforesaid, it, the said defendant, during the period aforesaid, to wit, in said district, became and was by law subject to the payment of, and was then and there by law required to pay to the said plaintiffs certain internal-revenue taxes, amounting in all to a large sum of money, to wit, the sum of $11,735.82. And the said plaintiffs, by their said attorney, aver that the said defendant did not then and there, to wit, within the period aforesaid, as in that behalf by law required, pay said amount so due and payable as aforesaid, as such internal-revenue taxes, or any part thereof, to the
5 said plaintiffs, and that the said defendant was then and there in arrear and indebted to the said plaintiffs in said sum of $11,735.82, to be paid by the said defendant to the said plaintiffs when it, the said defendant, should be thereunto afterwards requested, whereby and by reason of the said last-mentioned sum of money being and remaining wholly due and unpaid, an action has accrued to the said plaintiffs to demand and to have of and from the said defendant said sum of $11,735.82, together with interest in that behalf by law allowed, and their damages.

2. And for that whereas also heretofore, to wit, from the first day of July, A. D. 1862, to the first day of July, A. D. 1863, in said district, said defendant owned and possessed and then and there continuously during all said time had the care and management of a certain railroad, to wit, the said Memphis and Charleston Railroad, the said railroad during all said time having been engaged in the employment and business of transporting passengers and property for hire, and in transporting the mails of the United States, the net earnings, profits, incomes, and gains of which said railroad company during said time amounted to a certain large sum of money, to wit, to the sum of $73,820.83,
6 which last-mentioned sum was used and expended by the said defendant in the payment of the interest on the bonds of said railroad company, and in payment of certain coupons representing such interest, and in the further payment of certain dividends declared by

the said defendant due and payable to its stockholders as part of such net earnings, profits, incomes, and gains; and also in the construction and improvement by the said defendant of its said railroad beyond the condition of the same on said first day of July, A. D. 1862, tohereby and because of the premises said defendant during said time last named became, and was by law, subject to the payment to said plaintiffs, as internal-revenue taxes upon said last-named sum of money, the sum of $2,214.62, by law assessed against the said defendant, which said sum of money as such taxes is wholly due and unpaid; and whereas in said district, during the year ending June 30th, A. D. 1864, the net earnings, incomes, profits, and gains of said railroad company so used and expended by it as aforesaid during the said year amounted to a certain other large sum of money, to wit, the sum of $90,930.00, upon which said sum the internal-revenue taxes due and and payable
7 during said year from the said defendant to the said plaintiffs, for the reasons aforesaid and because of the premises, amounted to the sum of, to wit, $2,727.70, by law assessed against the said defendant, as such taxes, which said sum is wholly due and unpaid; and whereas in said district during the year ending June 30th, A. D. 1865, the net earnings, incomes, profits, and gains of said railroad company so used and expended by it as aforesaid during the said year amounted to a certain other large sum of money, to wit, the sum of $90,580.00, upon which said sum the internal-revenue taxes due and payable during said year from the said defendant to the said plaintiffs, because of the premises, amounted to a certain other large sum of money, to wit, the sum of $4,529.00, by law assessed against said defendant, as such taxes, which said sum is wholly due and unpaid; and whereas in said district, from the first day of July, A. D. 1865, to the first day of December, A. D. 1865, the net earnings, incomes, profits, and gains of the said railroad company, so used and expended by it as aforesaid during the said period, amounted to a certain other large sum of money, to wit, to the sum of $45,290.00, upon which said sum the internal-revenue taxes
8 during said period due and payable to the said plaintiffs by the said defendant because of the premises amounted to a certain large sum, to wit, to the sum, of $2,264.50, by law assessed against the said defendant, as such taxes as aforesaid, which said last-named sum is wholly due and unpaid; and the said plaintiffs by their said attorney aver that all the said several sums and amounts of money due as internal-revenue taxes from the said defendant to the said plaintiffs, as hereinbefore set forth and specified, and for the times and periods hereinbefore named, amounting in all to the sum of $11,735.82, are now due and payable, and hitherto since the same became due and payable in manner and form and for the reasons aforesaid have been justly owing from and by the said defendant to the said plaintiffs, and are now in arrear and unpaid; and so the said plaintiffs by their said attorney aver that said defendant was then and there, to wit, at and during the times aforesaid, indebted to the said plaintiffs in said sum of $11,735.82, to be paid by the said defendant to the said plaintiffs when, it the said defendant, should be thereunto afterwards requested; whereby and by reason of said sum of money being and remaining wholly due and unpaid an action has accrued to the said plaintiffs to
9 demand and to have of and from the said defendant said sum of $11,735.82, together with the interest thereon in that behalf by law allowed and their damages, because to pay the same or any part thereof the said defendant has hitherto wholly failed and refused, and still fails and refuses, although often requested so to do by the said

plaintiffs, contrary to the form of the statu'e in such case made and provided, whereby and force of the statu'e the said defendant is indebted in the sum of thirty thousand dollars, and thereby and by force of the said statu'e in such case made and provided an action hath accrued to the said plaintiffs to demand and to have in this behalf of and from said defendant said sum as aforesaid. Yet the said defendant (although often requested so to do) hath not as yet paid said sum of thirty thousand dollars above demanded, or any part thereof, to the said plaintiffs, but to do this hath wholly refused, and still doth refuse, to the damage of the said plaintiffs of thirty thousand dollars; and therefore they bring their suit, &c.

W. W. MURRAY,
U. S. Attorney.

10 (Endorsed:) No. 2429. United States circuit court, district of West Tennessee. The United States vs. Memphis and Charleston Railroad Company. Declaration in debt. Filed November 21st, 1877. Horace E. Andrews, clerk, L. H. Pillsbury, d. cl'k. W. W. Murray, U. S. dis. attorney.

Amended declaration.

UNITED STATES OF AMERICA,
Western District of Tennessee:

In the circuit court of the United States within and for said western district of Tennessee, in the sixth judicial circuit of the United States. November term, 1877, A. D.

THE UNITED STATES OF AMERICA
versus
THE MEMPHIS AND CHARLESTON R. R. Co. } No. 2429. L. Debt.

And for an amendment to the original declaration, filed in said court on the 21st day of November, A. D. 1877, in the above-entitled suit, the said plaintiffs, by their said attorney, now by leave of the court first had and obtained, further complain of the said defendant, which is in court by summons of a plea, that it, the said defendant, render unto the said plaintiffs the sum of thirty thousand dollars, which to the
11 said plaintiffs the said defendant owes and from them unjustly detains. For that whereas from the first day of January, A. D. 1862, continuously to the first day of December, A. D. 1865, in said district, to wit, at the city of Memphis, in said district, said defendant owned and possessed and then and there during all said time had the care and management of the said Memphis and Charleston Railroad, the said defendant and the said railroad during all said time having been engaged in the employment and business of transporting passengers and property for hire and in transporting the mails of the United States, the net earnings, profits, incomes, and gains of which said railroad company from the first day of January to the first day of July, A. D. 1862, amounted to a large sum of money, to wit, the sum of $50,000, which said sum was on, to wit, the said first day of July, A. D. 1862, used and expended by the said defendant in the payment of the interest on the bonds of the said railroad company and in payment of certain coupons representing such interest, and in the further payment of certain dividends declared by the said defendant due and payable

12 to its stockholders as part of such net earnings, profits, incomes, and gains; and whereas it then and there by law became and was the duty of the said railroad company, by its proper officers, to make and render under oath, as required by law, a list and return within thirty days after the time fixed when said interest and coupons and dividends became payable and due, being, to wit, said first day of July, A. D. 1862, to the Commissioner of Internal Revenue of the United States, the said list and return then and there containing a true and faithful account of the internal-revenue duties and taxes due to the United States on the amount of all said interest, coupons, and dividends and received by and chargeable to the said railroad company during the six months aforesaid. The said plaintiffs, by their said attorney, aver that the said railroad company and the said defendant then and there wholly failed and refused to make and render such list and return as aforesaid in manner and form as prescribed by law, and therein wholly made default, whereby the said defendant for such
13 failure, refusal, and default then and there forfeited to the United States as a penalty the sum of five hundred dollars.

And whereas, also in said district, during the six months ending January first, A. D. 1863, the net earnings, income, profits, and gains of the said railroad company, amounting to the sum of, to wit, $40,000, was, on, to wit, said first day of January, A. D. 1863, used and expended by the said defendant in the payment of the interest on the bonds of the said company, and in the payment of certain coupons representing such interest, and in the payment of certain dividends declared by the said defendant due and payable to its stockholders as part of such net earnings, profits, incomes, and gains; and whereas it then and there thereby became and was by law the duty of the said defendant, by its proper officers, to make and render under oath, as required by law, a list and return within thirty days after the time fixed when said interest and coupons and dividends became due and payable, being, to wit, the said first day of January, A. D. 1863, to the Commissioner of Internal Revenue of the United States—then and there
14 containing a true and faithful account of the internal-revenue duties and taxes due to the United States on the amount of all said interest, coupons, and dividends, and received by and chargeable to the said railroad company during the six months last aforesaid. The said plaintiffs, by their said attorney, aver that the said defendant then and there wholly failed and refused to make and render such list and return as aforesaid in manner and form as required by law, and therein then and there wholly made default, whereby the said defendant, for such failure, refusal, and default, then and there forfeited to the United States as a penalty the sum of five hundred dollars.

And whereas, also in said district, during the six months ending on the first day of July, A. D. 1863, the net earnings, incomes, profits, and gains of the said railroad company, amounting to the sum of, to wit, $40,000, was, on, to wit, said first day of July, A. D. 1863, used and expended by the said defendant in the payment of the interest on the bonds of the said company, and in the payment of certain coupons representing such interest, and in the payment of certain dividends
15 declared by the said defendant due and payable to its stockholders as part of such net earnings, incomes, profits, and gains; and whereas it then and there thereby became and was by law the duty of the said defendant by its proper officers to make and render under oath, as required by law, a list and return within thirty days after the time fixed when said interest and coupons and dividends became due and payable, being, on, to wit, the said first day of July, A. D. 1863,

to the Commissioner of Internal Revenue of the United States, the said list then and there containing a true and faithful account of the internal-revenue duties and taxes due to the United States on the amount of all said interest, coupons, and dividends, and received by and chargeable to the said railroad company. The said plaintiffs, by their said attorney, aver that the said defendant then and there wholly failed and refused to make and render such list and return as aforesaid in manner and form as required by law, and therein then and there wholly made default, whereby the said defendant, for such
16 failure, refusal, and default then and there forfeited to the United States as a penalty the sum of five hundred dollars.

And whereas, also in said district, during the six months ending on the first day of January, A. D. 1864, the net earnings, incomes, profits, and gains of the said railroad company, amounting to the sum of, to wit, $45,000, was, on, to wit, said first day of January, A. D. 1864, used and expended by the said defendant in the payment of the interest on the bonds of the said company, and in the payment of certain coupons representing such interest, and in the payment of certain dividends declared by the said defendant due and payable to its stockholders as part of such net earnings, incomes, profits, and gains; and whereas it then and there thereby became and was the duty of the said defendant, by its proper officers, to make and render under oath, as required by law, a list and return within thirty days after the time fixed when said interest and coupons and dividends became due and payable, being to wit, said first day of January, A. D. 1864, to the Commissioner of Internal Revenue of the United States, the said list and return
17 then and there to contain a true and faithful account of the internal-revenue duties and taxes due to the United States on the amount of all said interest, coupons, and dividends, and received by and chargeable to the said railroad company during the six months last aforesaid. The United States by their said attorney aver that the said defendant wholly failed and refused to make and render such list and return as aforesaid in manner and form as required by law, and therein then and there wholly made default, whereby the said defendant for such failure, refusal, and default then and there forfeited to the United States as a penalty the sum of five hundred dollars.

And whereas, also in said district, during the six months ending on the first day of July, A. D. 1864, the net earnings, incomes, profits, and gains of the said railroad company, being the sum of, to wit, $45,000, was on, to wit, said first day of July, A. D. 1864, used and expended by the said defendant in the payment of the interest on its bonds of indebtedness theretofore issued, payable in one or more years after the dates thereof, and in the payment of certain
18 coupons representing such interest, and in the payment of certain dividends due and payable to its stockholders as part of such net earnings, profits, incomes, and gains, and thereby become subject to a duty and tax of five per centum thereof, to be paid then and there by the said railroad company to the United States.

And whereas it then and there became and was by law the duty of the said defendant to make and render a list and return in duplicate to the assessor or assistant assessor of internal revenue of the United States for the eight collection district of the State of Tennessee, within thirty days after the time when said interest, coupons, and dividends became due and payable, being, to wit, the said first day of July, A. D. 1864, the said list and return then and there to contain a true and faithful account of the amount of the said duties and taxes, and then

and there to have annexed thereto a declaration of the president or treasurer of the said company, under oath or affirmation, in the form and manner prescribed by law, that the said list and return
19 contained a true and faithful account of the said duties and taxes. The said plaintiffs, by their said attorney, aver that the said defendant wholly failed, and refused then and there to make and render such list and return as aforesaid, with the declaration thereto annexed, within thirty days after the time when the said interest, coupons, and dividends became due and payable, being, to wit, the said first day of July, A. D. 1864, and then and there therein wholly made default, and then and there wholly failed and refused within said time to pay to the United States, to wit, to the Commissioner of Internal Revenue of the United States, said internal-revenue duties and taxes as in that behalf by law required, whereby the said defendant for such failure, refusal, and default in making and rendering the said list and return, and in paying the said duties and taxes forfeited to the United States as a penalty the sum of one thousand dollars. And for that whereas, also in said district, during the six months ending on the first day of January, A. D. 1864, the net earnings, incomes, profits, and
20 gains of the said railroad company, being the sum of, to wit, $45,000, was on, to wit, said first day of January, A. D. 1865, used and expended by the said defendant in the payment of the interest on its bonds of indebtedness theretofore issued, and in the payment of certain coupons representing such interest, and in the payment of certain dividends due and payable to its stockholders as part of such net earnings, profits, incomes, and gains, whereby the said defendant became by law subject to pay to the United States a duty and tax of five per centum of such net earnings, incomes, profits, and gains.

And whereas it then and there became and was by law the duty of the said defendant to make and render a list and return in duplicate to the assessor or assistant assessor of internal revenue of the United States for the eighth collection district of the State of Tennessee, within thirty days after the time when said interest, coupons, and dividends became due and payable, being, to wit, the said first day of January, A. D. 1865, the said list and return then and there to contain a true and faithful account of the amount of the said
21 duties and taxes, and then and to have annexed thereto a declaration of the president or treasurer of the said railroad company, under oath or affirmation, in the form and manner prescribed by law, that the said list and return contained a true and faithful account of the said duties and taxes; and the said plaintiffs by their said attorney aver that the said defendant wholly failed and refused then and there to make and render such list and return as aforesaid, with such declaration as aforesaid annexed, and within the time aforesaid in manner and form as required by law, but therein wholly made default, and then and there wholly failed and refused to pay in manner and form as required by law to the United States, to wit, to their Commissioner of Internal Revenue, said duties and taxes, whereby the said defendant for and on account of such failure, refusal, and default to make and render the said list and return, and for and on account of such failure and refusal to pay the said duties and taxes, then and there forfeited to the said plaintiffs as a penalty one thousand dollars.

And for that whereas, also in said district, during the six
22 months ending on the first day of July, A. D. 1865, the net earnings, incomes, profits, and gains of the said railroad company, being the sum of, to wit, $25,000, was on, to wit, said first day of July,

A. D. 1865, used and expended by the said defendant in the payment of the interest on its bonds of indebtedness theretofore issued, and in the payment of certain coupons representing such interest, and in the payment of certain dividends due and payable to its stockholders as part of such net earnings, profits, incomes, and gains, whereby the said defendant became by law subject to pay to the United States a duty and tax of five per centum of such net earnings, incomes, profits, and gains; and whereas it then and there became and was by law the duty of the said defendant to make and render a list and return in duplicate to the assessor or assistant assessor of internal revenue of the United States for the eighth collection district of the State of Tennessee, within thirty days after the time when said interest coupons and dividends became due and payable, being, to wit, the said first day of July, A. D. 1865, the said list and return, then and there to con-
23 tain a true and faithful account of the amount of the said duties and taxes, and then and there to have annexed thereto a declaration of the president or treasurer or the said railroad company, under oath or affirmation in the form and manner prescribed by law, that the said list and return contain a true and faithful account of the said duties and taxes; the said plaintiffs by their said attorney aver that the said defendant then and there wholly failed and refused to make and render said list and return as aforesaid, with such declaration annexed as aforesaid, and within the time aforesaid, in manner and form as required by law, and therein wholly made default, and did then and there wholly fail*ed* and refuse to pay to the United States in manner and form as by law required, to wit, to the Commissioner of Internal Revenue of the United States, said duties and taxes, whereby the said defendant for and on account of such failure, refusal, and default to make and render the said list and return, and for and on account of such refusal to pay to the plaintiffs said duties and taxes, then and there forfeited to the said plaintiffs as a penalty the sum of one thousand dollars.

And for that whereas, also in said district, during the five months ending on the 30th day of November, A. D. 1865, the net earn-
24 ings, incomes, profits, and gains of the said railroad company, being the sum of, to wit, $20,000, was on, to wit, the said 30th day of November, used and expended by the said defendant in the payment of the interest on its bonds of indebtedness therefore issued, and in the payment of certain coupons representing such interest, and in the payment of certain dividends due and payable to its stockholders as part of such net earnings, incomes, profits, and gains, whereby the said defendant became by law subject to pay to the United States a duty and tax of five per centum of such net earnings, incomes, profits, and gains.

And whereas it then and there became and was by law the duty of the said defendant to make and render a list and return in duplicate to the assessor or assistant assessor of internal revenue of the United States for the eighth collection district of the State of Tennessee, within thirty days after the time when said said interest, coupons, and dividends became due and payable, being, to wit, on the said 30th day of November, the said list and return then and there to contain a true and faithful account of the amount of the said duties and taxes, and then and there to have annexed thereto
25 a declaration of the president or treasurer of the said company, under oath or affirmation, in the form and manner prescribed by law, that the said list and return contained a true and faithful account

of the said duties and taxes. The said plaintiffs, by their said attorney, aver that the said defendant then and there wholly failed and refused to make and render such list and return as aforesaid, within the time aforesaid, in manner and form as required by law, but therein wholly made default, and then and there wholly failed and refused to pay in manner and form as required by law to the United States, to wit, to their Commissioner of Internal Revenue, said duties and taxes, and therein wholly made default, whereby the said defendant, for and on account of such failure, refusal, and default to make and render the said list and return, and for and on account of such failure, refusal, and default to pay to the United States the said duties and taxes then and there forfeited to the said plaintiffs as a penalty, the sum of one thousand dollars.

But to pay the said penalties, or any of them, or any part
26 thereof to the said plaintiffs, the said defendant has hitherto wholly failed and refused, and still wholly fails and refuses, although often requested so to do by the said plaintiffs, and contrary to the form of the statu'e in such case made and provided, whereby and by force of the statu'e the said defendant forfeited for said offences the sum of six thousand dollars, and thereby and by force of the said statu'e in such case made and provided an action hath accrued to the said plaintiffs to demand and to have in this behalf of and from said defendant said sums so forfeited as aforesaid.

Yet the said defendant, although often requested so to do, hath not as yet paid said sum of six thousand dollars above demanded, or any part thereof, to the said plaintiffs. But to do this hath wholly refused and still doth refuse, to the damage of the said plaintiffs thirty thousand dollars, and therefore they bring their suit, &c.

W. W. MURRAY,
U. S. Attorney.

(Endorsed:) No. 2429. United States circuit court, district of Wester' Tennessee. The United States vs. The Memphis & Charleston
27 Railroad Company. Amendment to the declaration in debt. Filed April 27th, 1878. H. E. Andrews, clerk., L. H. Pillsbury, D. cl'k. W. W. Murray, U. S. dis. attorney.

Pleas of defendant.

Circuit court of the United States, western district of Tennessee. November term, 1878.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
THE MEMPHIS & CHARLESTON RAILROAD Company, defendant. } No. 2429.

The defendant, the Memphis & Charleston Railroad Company, by Humes & Poston, its attornies, comes and defends the wrongs and injuries when, &c., and says that defendant company does not owe to the plaintiff, The United States of America, the said sums of money, to wit, the sum of $11,735.82, demanded in the first count of the original declaration, nor the sum of $2,214.62 demanded in the 2nd count, nor the sum of $2,727.70 demanded in the 3rd count, nor the sum of
28 $4,529.00 demanded in the 4th count, nor the sum of $2,264.50 demanded in the 5th count of said original declaration, nor the

sum of $500.00 demanded in the 1st count of the amended declaration, nor $500 demanded in the second count, nor $500 demanded in the 3rd count, nor $500 demanded in the 4th count, nor $1,000.00 demanded in the 5th count, nor $1,000.00 demanded in the 6th count, nor $1,000.00 demanded in the 7th count, nor the 1,000.00 demanded in the 8th count of the amended declaration, nor any part of any of said several sums in manner and form as the plaintiff has above in said several counts of the original and amended declarations complained against this defendant, and of this the defendant puts itself upon the country, &c.

HUMES & POSTON,
Att's for Def.

2. PLEA.—And for further plea defendant says it has paid said sums above set forth in full to plaintiff, and this it is ready to verify, wherefore, &c.

HUMES & POSTON,
Attornies for Def.

29 3RD. PLEA.—And for a further plea in this behalf, as to five several counts of the original declaration, and as to the 8 counts of the amended declaration, and each and all the said sums therein demanded, and the wrongs therein alleged, defendant that the said plaintiff ought not to have or maintain his aforesaid action thereof against this defendant, because defendant says that after the date of the accrual of each and all the sums of money demanded by plaintiff in the said original and amended declaration, to wit, in July, 1870, the defendant paid to the plaintiff the sum of $25,000.00 in full satisfaction of all said sums and liabilities; and the said plaintiff then and there accepted and received the same of and from the said defendant, in full satisfaction and discharge of the said several sums and all of them in the said declarations mentioned, and of all penalties, forfeitures, damages and sums of money thereupon due, owing, or accrued. And this the defendant is ready to verify, wherefore defendant prays judgment if the said plaintiff ought to have or maintain his
30 aforesaid action thereof against this defendant, &c.

HUMES & POSTON.
Att's for Def't.

(Endorsed:) No. 2429. United States circuit court, district of West Tenn. The United States vs. Mem. & Ch. R. R. Co. Pleas of defendant. Filed Nov. 23rd, 1878. B. W. Etheridge, cl'k, W. E. Andrews, D. C. Humes & Poston, att's for def.

Pleas & demurrer.

UNITED STATES
vs.
THE MEMPHIS & CHARLESTON RAILROAD CO. } 2429. Law.

1. The defendant for plea to the original declaration says action non, because it says that all the taxes claimed therein accrued, if at all, more than fifteen months before the commencement of this suit, and this it is ready to verify, wherefore, &c.

2. And for a further plea to the amendment filed April 27th,
31 1878, to the declaration, defendant says the several causes of action therein alleged accrued, if at all, more than five years before the

commencement of this suit, and this it is ready to verify, wherefore, &c.

HUMES & POSTON,
Att's for Defendants.

And come plaintiffs by attorney and demur /to the pleas Nos. 1 & 2 above pleaded, because the same are insufficient in law, and prays the judgement of the court, &c.

W. W. MURRAY,
U. S. Attorney.

(Endorsed:) No. 2429. The United States vs. The Memphis & Charleston Railroad Company. Pleas & demurrer. Filed March 3rd, 1879. B. W. Etheridge, clerk, H. E. Andrews, D. C.

Replication to pleas of defendant.

Circuit court, Nov. term, A. D., 1878.

THE UNITED STATES
vs.
THE MEMPHIS & CHARLESTON RAILROAD Company. } No. 2429.

And the said plaintiffs as to the plea of the said defendant by
32 it first above pleaded, and whereof it put itself upon the country, doth the like.

W. W. MURRAY,
U. S. Attorney.

And the said plaintiffs, as to the plea of said defendant by it secondly above pleaded, say precludi non, because they say that the said defendant has not paid the several sums claimed in their said original and amended declaration, or any part thereof, and of this they put themselves upon the country.

W. W. MURRAY,
U. S. Attorney.

And the defendant doth the like.

HUMES & POSTON,
Att's for Def't.

And the said plaintiffs as to the plea of the said defendant by it thirdly above pleaded, say precludi non, because they that said defendant did not pay to plaintiffs the sum of twenty-five thousand dollars, or any other sum, in satisfaction of the several sums claimed in their original and amended declaration, or any part thereof, but that the several sums set forth in their original and amended declaration is still due and unpaid, and of this they put themselves upon the country.

W. W. MURRAY,
U. S. Attorney.

33 And the pl'f doth the like.

HUMES & POSTON,
Att's for Defendant.

(Endorsed:) No. 2429 L. The United States vs. The Memphis & Charleston Railroad Company. Replication to pleas of defendant. Filed Nov. 26th, 1878. B. W. Etheridge, cl'k, H. E. Andrews, D. C.

34 UNITED STATES OF AMERICA,
Western District of Tennessee:

In the circuit court of the United States within and for the western district of Tennessee, in the sixth judic'al circuit thereof.

Proceedings had in said court, at a regular term thereof, begun and held for its November term, A. D. 1878, at the United States court-house, in the city of Memphis, in said district, on, to wit, the 13th day of Dec., A. D. 1878, in the following cause, to wit:

UNITED STATES, PLAINTIFF,
vs.
MEMPHIS AND C. R. R. CO., DEFENDANT. } No.

By agreement of counsel, in open court, and for satisfactory reasons to the court appearing, this cause is set for hearing January 20th, 1879.

35 UNITED STATES OF AMERICA,
Western District of Tennessee:

In the circuit court of the United States within and for the western district of Tennessee, in the sixth judic'al circuit thereof.

Proceedings had in said court, at a regular term thereof, begun and held for its November term, A. D. 1878, at the court-house, in the city of Memphis, in said district, on, to wit, the 20th day of Jan'ry, A. D. 1879, in the following cause, to wit:

UNITED STATES, PLAINTIFF,
vs.
MEMPHIS AND CHARLESTON R. R., DEFENDANT. } No. 2429.

By consent of counsel, and for satisfactory reasons to the court appearing, this cause set for hearing January 20th, and is now set for January 23rd.

36 UNITED STATES OF AMERICA,
Western District of Tennesse:

In the circuit court of the United States within and for the western district of Tennessee, in the sixth judic'al circuit thereof.

Proceedings had in said court, at a regular term thereof, begun and held for its November term, A. D. 1878, at the United States court-house, in the city of Memphis, in said district, on, to wit, the 21st day of Jan'y, A. D. 1879, in the following cause, to wit:

UNITED STATES, PLAINTIFF,
vs.
MEMPHIS AND CHARLESTON R. R. CO., DEFENDANT. } No.

By consent of counsel, and for satisfactory reasons to the court appearing, this cause set for hearing January 23d, is now set for January 27th. Judge Brown did not sit in this case.

37 UNITED STATES OF AMERICA,
Western District of Tennessee:

In the circuit court of the United States within and for the western district of Tennessee, in the sixth judic'al circuit thereof.

Proceedings had in said court, at a regular term thereof, begun and held for its November term, A. D. 1878, at the United States court-house, in the city of Memphis, in said district, on, to wit, the 17th day of Feb., A. D. 1879, in the following cause, to wit:

UNITED STATES, PLAINTIFF,
vs.
MEMPHIS AND CHARLESTON R. R., DEFENDANT. } No. 2429.

In this cause came the parties, by their attorneys, and on motion it is ordered that a jury do come, and thereupon came a jury of good and lawful men, to wit, Joseph H. Morton, James M. Reavis, Hosed Jackson, G. S. Jordan, A. Wolbrecht, W. H. Horton, Patrick Meagher, J. N. Jones, A. S. Brown, A. W. Hannd, Josiah Dickson, and Godfrey Salem, who being duly elected, tried, and sworn well and truly to try the issues joined in this cause, and a true verdict render according to the evidence, and thereupon the trial of said cause was com-
38 menced, and there not being sufficient time to conclude the same on to-day, it is ordered that said trial be continued till to-morrow at ten o'clock.

39 UNITED STATES OF AMERICA,
Western District of Tennessee:

In the circuit court of the United States within and for the western district of Tennessee, in the sixth judic'al court thereof.

Proceedings had in said court, at a regular term thereof, begun and held for its November term, A. D. 1878, at the United States court-house, in the city of Memphis, in said district, on, to wit, the 18th day of Feb., A. D. 1879, in the following cause, to wit:

UNITED STATES, PLAINTIFF,
vs.
MEMPHIS AND CHARLESTON R. R., DEFENDANT. } No. 2429.

In this cause came the parties, by their attorneys, and came also the jury heretofore empannelled, and thereupon the trial of the same was resumed, and there not being sufficient time to conclude said trial on to-day, it is ordered that the same be continued till to-morrow morning at ten o'clock.

40 UNITED STATES OF AMERICA,
Western District of Tennessee:

In the circuit court of the United States within and for the western district of Tennessee, in the sixth judic'al circuit thereof.

Proceedings had in said court, at a regular term thereof, begun and held for its November term, A. D. 1878, at the United States court-house, in the city of Memphis, in said district, on, to wit, the 19th day of Feb., A. D. 1879, in the following cause, to wit:

UNITED STATES, PLAINTIFF,
vs.
MEMPHIS AND CHARLESTON R. R., DEFENDANT. } No. 2429.

The further hearing of this case is adjourned till Friday next.

41 UNITED STATES OF AMERICA,
Western District of Tennessee:

In the circuit court of the United States within and for the western district of Tennessee, in the sixth judic'al circuit thereof.

Proceedings had in said court, at a regular term thereof, begun and held for its November term, A. D. 1878, at the United States court-house, in the city of Memphis, in said district, on, to wit, the 20th day of Feb., A. D. 1879, in the following cause, to wit:

UNITED STATES, PLAINTIFF,
vs.
MEMPHIS AND CHARLESTON R. R., DEFENDANT. } No. 2429.

The further hearing of this cause is continued till Monday morning next at ten o'clock.

42 UNITED STATES OF AMERICA,
Western District of Tennessee:

In the circuit court of the United States within and for the western district of Tennessee, in the sixth judic'al circuit thereof.

Proceedings had in said court, at a regular term thereof, begun and held for its November term, A. D. 1878, at the United States court-house, in the city of Memphis, in said district, on, to wit, the 3rd day of March, A. D. 1879, in the following cause, to wit:

UNITED STATES, PLAINTIFF,
vs.
MEMPHIS AND CHARLESTON RAILROAD CO., defendant. } No. 2429. Debt.

Came the district attorney on behalf of the United States, and the said defendant, by its attorneys, and came also the jury heretofore empanneled herein, to wit, Joseph H. Morton, James M. Reaves, Hosea

Jackson, G. S. Jordan, A. Walbrecht, W. H. Horton, Patrick Meagher, J. N. Jones, A. S. Brown, A. W. Hannd, Josiah Dickson, and Godfrey Salem, when on motion of said defendant, by its attorneys, and for satisfactory reasons to the court appearing, it is hereby ordered by the court that the further consideration of this case be, and the same
43 is hereby, postponed until Monday morning next, March 3rd, A. D. 1879, and by mistake not having been entered on the minutes, is by the court now ordered to be entered as of said last-named day.

44 UNITED STATES OF AMERICA,
Western District of Tennessee:

In the circuit court of the United States within and for the western district of Tennessee, in the sixth judic'al circuit thereof.

Proceedings had in said court, at a regular term thereof, begun and held for its November term, A. D. 1878, at the United States court-house, in the city of Memphis, in said district, on, to wit, the 3d day of March, A. D. 1879, in the following cause, to wit:

UNITED STATES, PLAINTIFF,
vs.
MEMPHIS AND CHARLESTON RAILROAD CO., defendant. } No. 2429.

Came again the district attorney, on behalf of the United States, and the said defendant, by its attorneys, and came also the jury heretofore empanneled herein, to wit, Joseph H. Morton, James M. Reavis, Hosea Jackson, G. S. Jordan, A. Wolbrecht, W. H. Horton, Patrick Meagher, J. N. Jones, A. S. Brown, A. W. Hannd, Josiah Dickson, and Godfrey Salem, when the trial of the case was resumed, and there not being time to complete the trial and consideration of this case to-day, the further consideration of the same, for satisfactory reasons to the
45 court appearing, is hereby postponed until to-morrow, March 4th, A. D. 1879.

46 UNITED STATES OF AMERICA,
Western District of Tennessee:

In the circuit court of the United States within and for the western district of Tennessee, in the sixth judic'al circuit thereof.

Proceedings had in said court, at a regular term thereof, begun and held for its November term, A. D. 1878, at the United States court-house, in the city of Memphis, in said district, on, to wit, the 4th day of March, A. D. 1879, in the following cause, to wit:

UNITED STATES, PLAINTIFF,
vs.
MEMPHIS AND CHARLESTON RAILROAD CO., defendant. } No. 2429.

Came again the district attorney, on behalf of the United States, and the said defendant, by its attorneys, and came again also the jury heretofore empanneled herein, to wit, Joseph H. Morton, James M. Reavis, Hosea Jackson, G. S. Jordan, A. Wolbrecht, W. H. Horton, Patrick Meagher, J. N. Jones, A. S. Brown, A. W. Hannd, Josiah Dick-

son, and Godfrey Salem, when the trial of this case was resumed, and there not being sufficient time to conclude the trial and consideration of this case to-day, the same, for satisfactory reasons to the court
47 appearing, is hereby postponed until to-morrow, March 5th, A. D. 1879.

48 UNITED STATES OF AMERICA,
Western District of Tennessee:

In the circuit court of the United States within and for the western district of Tennessee, in the sixth judic'al circuit thereof.

Proceedings had in said court, at a regular term thereof, begun and held for its November term, A. D. 1878, at the United States court-house, in the city of Memphis, in said district, on, to wit, the 5th day of March, A. D. 1879, in the following cause, to wit:

THE UNITED STATES, PLAINTIFF,
vs.
MEMPHIS AND CHARLESTON RAILROAD CO., defendant. } No. 2429.

Came again the district attorney, on behalf of the United States, and the said defendant, by its attorneys, and came again also the jury heretofore empanneled herein, to wit, Joseph H. Morton, James M. Reavis, Hosea Jackson, G. S. Jordan, A. Wolbrecht, W. H. Horton, Patrick Meagher, J. N. Jones, A. S. Brown, A. W. Hannd, Josiah Dickson, and Godfrey Salem, when the trial of this cause was resumed, and there not being time to conclude the trial and consideration of the same to-day, the further consideration thereof is hereby, for satisfac-
49 tory reasons to the court appearing, postponed until to-morrow, March 6th, A. D. 1879.

50 UNITED STATES OF AMERICA,
Western District of Tennessee:

In the circuit court of the United States within and for the western district of Tennessee, in the sixth judic'al circuit thereof.

Proceedings had in said court, at a regular term thereof, begun and held for its November term, A. D. 1878, at the United States court-house, in the city of Memphis, in said district, on, to wit, the 6th day of March, A. D. 1879, in the following cause, to wit:

UNITED STATES, PLAINTIFF,
vs.
MEMPHIS AND CHARLESTON R. R. CO., defendant. } No. 2429. Debt.

Came again the district attorney, on behalf of the United States, and the said defendant, by its attorneys, and came again also the jury heretofore empanneled herein, to wit, Joseph H. Morton, James M. Reavis, Hosea Jackson, G. S. Jordan, A. Wolbrecht, W. H. Horton, Patrick Meagher, J. N. Jones, A. S. Brown, A. W. Hannd, Josiah Dickson, and Godfrey Salem, when, for satisfactory reasons to the court, that the further consideration of this case be, and it is hereby, postponed until Monday morning next, March 10th, A. D., 1879.

51 UNITED STATES OF AMERICA,
Western District of Tennessee:

In the circuit court of the United States within and for the western district of Tennessee, in the sixth judic'al circuit thereof.

Proceedings had in said court, at a regular term thereof, begun and held for its November term, A. D. 1878, at the United States court-house, in the city of Memphis, in said district, on, to wit, the 11th day of March, A. D. 1879, in the following cause, to wit:

UNITED STATES, PLAINTIFF,
vs.
MEMPHIS AND CHARLESTON RAILROAD COMPANY, defendant. } No. 2429.

The demurrer of the plaintiffs to the pleas marked filed March 3d, 1879, which said pleas set up the statutes of limitations of five years, and of fifteen months, being argued, understood, and duly considered by the court, and the court being of opinion that the demurrer to the plea of the statute of limitations of fifteen months is well taken, doth sustain the same, and being of opinion that the demurrer to the plea of the statute of limitations of five years is not well taken, doth overrule the same, and it is so ordered and adjudged, and the case will stand for trial upon the other issues joined, and, for sufficient reasons appearing to the court, it is ordered that this order be made now for and as of the date the 3rd day of March, 1879.

52 UNITED STATES OF AMERICA,
Western District of Tennessee:

In the circuit court of the United States within and for the western district of Tennessee, in the sixth judic'al circuit thereof.

Proceedings had in said court, at a regular term thereof, begun and held for its November term, A. D. 1878, at the United States court-house, in the city of Memphis, in said district, on, to wit, the 11th day of March, A. D. 1879, in the following cause, to wit:

UNITED STATES, PLAINTIFF,
vs.
MEMPHIS AND CHARLESTON R. R. CO., DEFENDANT. } No. 2429.

Came again the district attorney, on behalf of the United States, and the said defendant, by its attorneys, and came again also the jury heretofore empanneled herein, to wit, Joseph H. Morton, James M. Reavis, Hosea Jackson, G. S. Jordan, A. Wolbrecht, W. H. Horton, Patrick Meagher, J. N. Jones, A. S. Brown, A. W. Hannd, Josiah Dickson, and Godfrey Salem, when the trial of this case was resumed; and the jury having heard the testimony, listened to the argument of counsel, and received the charge of the court relative to the questions of law arising in the case, on their oaths say they find the is-
53 sues herein in favor of the said plaintiffs, The United States, and assess the amount of their verdict as follows:

1. On dividend declared by said defendant on March 17th, 1863, a tax of $1,625.45, being three per centum on $57,515.60, the value in legal currency, when paid, of $143,789, the whole amount of said dividend then paid in confederate money. 2. On interest coupons of said defendant falling due November 1st, 1862, May 1st, 1863, November 1st, 1863, and May 1st, 1864, a tax of $819.17, being three per centum on $27,326.55, the value, when paid, in legal currency of $88,935, the portion of such coupons paid in confederate money; and the further tax of $2,274.45 on the remaining portion of said coupons falling due, as aforesaid, being three per centum on $75,815.83, such remaining portion of said coupons. 3. On interest coupons of said defendant falling due November 1st, 1864, May 1st, 1865, and November 1st, 1865, a tax of $6,793.50, the same being five per centum on $135,870, the amount of said last-named coupons, making, in all, the sum of $11,513.19 as the whole amount of their verdict. And thereupon the said defendant, by its attorneys, moves the court for a new trial herein, the
54 consideration of which motion is hereby postponed to a future day of the term.

55 UNITED STATES OF AMERICA,
Western District of Tennessee:

In the circuit court of the United States within and for the western district of Tennessee, in the sixth judicial circuit thereof.

Proceedings had in said court, at a regular term thereof, begun and held for its November term, A. D. 1878, at the United States court-house, in the city of Memphis, in said district, on, to wit, the 22nd day of April, A. D. 1879, in the following cause, to wit:

THE UNITED STATES, PLAINTIFF,
vs.
MEMPHIS AND CHARLESTON R. R. CO., DEFENDANT. } No. 2429. Debt.

Came again the district attorney, on behalf of the United States, and the said defendant, The Memphis and Charleston Railroad Company, by its attorneys, when this suit came on to be heard on the motion for a new trial made and entered herein on the eleventh day of March last, and the same having been considered by the court, is hereby disallowed and overruled, and a new trial herein refused. On motion of the district attorney, it is therefore considered by the court that
56 the said plaintiffs, The United States of America, have and recover of and from the said defendant, The Memphis and Charleston Railroad Company, the sum of eleven thousand five hundred and thirteen dollars and nineteen cents, the amount of the verdict heretofore rendered herein, together with the costs of this suit, and that execution issue therefor.

57 UNITED STATES OF AMERICA,
Western District of Tennessee:

In the circuit court of the United States within and for the western district of Tennessee, in the sixth judic'al circuit thereof.

Proceedings had in said court, at a regular term thereof, begun and held for its November term, A. D. 1878, at the United States court-house, in the city of Memphis, in said district, on, to wit, the 24' day of May, 1879, in the following cause, to wit:

THE UNITED STATES, PLAINTIFF,
vs.
MEMPHIS & CHARLESTON RAILROAD CO., DEFENDANT. } No. 2429.

Comes the defendant in open court and tenders its supersedeas bond in the penalty of twenty-three thousand and twenty-six $\frac{38}{100}$ dollars, conditioned as required by law for a supersedeas bond, with Napoleon Hill as surety; and the court, after examination, being satisfied with the solvency and sufficiency of the said bond, orders that it be accepted and filed as a supersedeas bond.

58 *Bill of exceptions.*

In the circuit court of the United States for the western district of Tennessee.

THE UNITED STATES
vs.
THE MEMPHIS & CHARLESTON RAILROAD COMPANY.

This cause was tried at the November term, 1878, of the circuit court of the United States for the western district of the State of Tennessee, when the following proceedings, orders, judgments, &c., were had, rendered, and taken, to wit:

After the pleadings were read, the plaintiffs introduced evidence tending to show that interest coupons on the bonds of the defendant company matured at the following dates for the following
59 amounts, to wit:

November 1st, 1862	$36,910 37
May 1st, 1863	36,910 36
November 1st, 1863	45,465 00
May 1st, 1864	45,465 00
November 1st, 1864	45,465 00
May 1st, 1865	45,465 00
November 1st, 1865	45,465 00

And that no part of the tax on said interest coupons has been paid to the United States, and that all of said interest coupons were paid to the holders prior to the commencement of this suit, either in cash or in second-mortgage bonds of the defendant company, at a discount at the option of the holder.

The plaintiff introduced evidence tending to prove that the defendant on the 17th March, 1863, declared a dividend of four per cent. on

its capital stock, payable in confederate money—said dividend amounting in all to $202,509.00—and that no tax on said dividend has been paid to the United States.

Plaintiff then introduced in evidence the following correspondence, certified from the Treasury Department of the United States,
60 to wit:

UNITED STATES OF AMERICA:

TREASURY DEPARTMENT,
January 22nd, 1879.

Pursuant to section 882 of the Revised Statutes, I hereby certify that the annexed are true copies of papers on file in this department.

In witness whereof I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

[SEAL.]

JOHN SHERMAN,
Secretary of the Treasury.

UNITED STATES INTERNAL REVENUE,
ASSESSOR'S OFFICE 8TH DISTRICT, TENN.,
Memphis, Nov. 20th, 1869.

Hon. C. DELANO,
Comm'r of Int. Rev., Washington, D. C.:

SIR: I enclose for your consideration copies of certain communications rec'd by ass't assessor H. I. Sheepherd, from M. J.
61 Wicks, pres't Memphis & Charleston R. R. Co., in answer to a demand made upon that co. for a return of interest on bonds, &c., and by the ass't assessor referred to me.

I apprehend that the request of Mr. Wicks, that the co. be allowed to suspend payment of the am't due the gov't until the settlement of their claims for mail service, cannot be entertained by you,

If I am correct in this supposition I wish for full and explicit instructions as to the mode of procedure for making the assessment.

I also wish to state, for your information, that many of the coupons were funded or taken up by the issue of new bonds.

Does the finding of a coupon constitute a payment?

I cannot say whether the coupons funded included any due since May, '66, the date of the first mentioned in the accompanying schedule. These coupons are payable at the Huntsville (Ala.) office of the co., and the coupon acc't is kept there.

This office (Memphis), however, is declared the principal office
62 of the company and the tax on dividends, &c., is paid here, as well as the monthly assessments for gross receipts of this division of the road.

Mr. Wicks states that he has no knowledge of any particular place having been designated by the Comm'r of Int. Rev. as the point at which the taxes due from the company for int. on bonds, dividends, &c., should be paid.

If no such designation has ever been made, would not this, as the principal office of the company, be the proper place? You will perceive that Mr. Wicks admits that the tax on the whole am't of interest due since May, '66, is entered to the credit of the gov't on their books.

In this case, would an assessment for a period further back than fifteen months be illegal; and should the penalty for neglect be added to any assessment made?

I remain your ob't servant,

A. B. NEWKIRK,
U. S. Assessor.

(Endorsed:) No. 346. A. B. Newkirk, assessor of internal
63 revenue, 8th district, Tenn. Dated Memphis, Nov. 20th 1869. In relation to assessment on bonds, Memphis & Charleston Railroad Company.

MEMPHIS AND CHARLESTON RAILROAD,
OFFICE OF THE PRESIDENT,
Memphis, Tenn., Nov. 14th, 1869.

H. I. SHEPPARD, Esq., *Ass't Assessor:*

DEAR SIR: This company has to the credit of the government, on their books at Huntsville, tax on coupons, $21,475.30. We have also to debit of the government, Post-Office Department, $20,897.40, earned before the war. This claim has been in the hands of Messrs. M. Baird & Co., Phila., and we had hoped it would have been favorably acted upon ere this, and we now trust that the Treasury Department will insist upon the collection of the tax on coupons until action is taken upon P. O. claim, as we learn similar claims have been allowed & paid to other companies. By forwarding this state-
64 ment to the dep't at Washington you will greatly oblige,
Yours, with respect,
(Signed) M. J. WICKS, *Pres't.*

MEMPHIS & CHARLESTON R. R.,
OFFICE OF THE PRESIDENT,
Memphis, Tenn., 19 Nov., 1869.

H. I. SHEPPARD, Esq., *Ass't Assessor:*

Please find herein statement from Huntsville office which I trust will cover the points.

You will find the full am't is credited each month, whether or not presented for payment.

Resp't.,
(Signed) M. J. WICKS, *Pres't.*

MEMPHIS & CHARLESTON R. R. Co.,
Huntsville, Ala., Nov. 17th, 1869.

Statement of tax on coupons due U. S. Gov'n't.

65 FIRST-MORTGAGE BONDS.

Due.								
May '66.	Cou,	No. 24	on 1,294	bonds,	$35.00	ea	.....	45,290
Nov. '66.	"	" 25	"	"	"	"	.....	45,290
May '67.	"	" 26	"	"	"	"	.....	45,290
Nov. '67.	"	" 27	"	"	"	"	.....	45,290
May '68.	"	" 28	"	"	"	"	.....	45,290
Nov. '68.	"	" 29	1,293	"	"	"	.....	45,255
May '69.	"	" 30	"	"	"	"	.....	45,255
								$316,960

SECOND-MORTGAGE BONDS.

July '67.	"	No. 1	on 24	bonds	$35.00	each	.....	840
Jan'ry '68.	"	" 2	" 566	"	"	"	.....	19,810

July '68.	"	"	3 "	884	"	"	"	.....	30,940
Jan'ry '69.	"	"	4 "	1,000	"	"	"	.....	35,000
July '69.	"	"	5 "	1,000	"	"	"	.....	35,000
									121,590

316,960
121,590

5% tax on total 438,550—$21,927.50.

The other bonds of the series remained in the hands of the company unsold.

N. B.—The above statement does not include coupon No. 31 on 1st mortgage bond due 1st Nov., 1869.

This I propose in my letter to you to settle here.

66 (Endorsed:) Statement and communications received from M. J. Wicks, president Memphis & Charleston R. R. Co., accompanying letter dated Nov. 20th, 1869, from assessor 8th district, Tenn.

UNITED STATES INTERNAL REVENUE,
ASSESSOR'S OFFICE, 8TH DISTRICT, TENN.,
Memphis, Jan'y 15th, 1870.

SIR: Your letter of Dec. 6th, was duly received and contents noted. I have delayed action as per instructions until the president of the road, Maj. Wicks, returned from New York.

I called upon him to-day and told him that I had caused the company to be assessed 5% on the last two installments of interest on first-mortgage bonds, amounting to $90,510.00, due Nov. '68 and May '69, and the two last installments of interest on second-mortgage bonds (all within 15 m'ths) amounting to $70,000.00, due Jan'y and July '69, aggregating $8,025.50, and added $4,012.75 as a penalty of 50%, making a total of $12,038.25.

Also, that the company was liable to a penalty of $1,000 for
67 each failure to return the amount of interest due and payable on first-mortgage bonds, Nov. '66 to May '68 inclusive, and on 2nd mortgage bonds due July '67 to July '68 inclusive, amounting to $7,000. That if he was willing to pay this sum without prosecution, I thought it would be satisfactory to the department, to which he replied that he would willingly pay the $7,000 at any time, and also the assessment of $12,038.25, as he desired to comply with all the requirements of the revenue laws.

If satisfactory to you, I will have entered on the January list the penalty of $7,000 and return the same to the collector, or will carry out any other instructions you may be pleased to give in the premises.

See copy of return of Memp. and Charleston R. R. Co., enclosed.

I take it that the failure to return the first instal'ment of interest due in May, '66, would not make the co. liable to the penalty of $1,000, being before the passage of the law.

Very respectfully,

A. B. NEWKIRK,
U. S. Assessor.

Hon. J. W. DOUGLASS,
Acting Comm'r.

68 (Endorsed:) No. 413. A. B. Newkirk, assessor of internal revenue, 8th district, Tenn. In relation to letter of Dec. 6th, Memphis and Charleston R. R. Co., dated Memphis, Jan'y 15th, 1870.

MEMPHIS & CHARLESTON R. R. CO.,
Huntsville, Ala., November 17th, 1869.

Statement of tax on coupons due U. S. Government.

FIRST-MORTGAGE BONDS.

Due.					
May, '66.	Coupons	No. 24,	on 1,294	bonds, $35.00 ea.	45,290
Nov., "	"	" 25,	" 1,294		45,290
May, '67.	"	" 26,	" 1,294		45,290
Nov., '67.	"	" 27,	" 1,294		45,290
May, '68.	"	" 28,	" 1,294		45,290
Nov., '68.	"	" 29,	" 1,293		45,255
May, '69.	"	" 30,	" 1,293		45,255
					316,960

SECOND-MORTGAGE BONDS.

July, '64.	"	No. 1,	on 24	bonds,	$35.00	ea.	840
Jan'y, '68.	"	" 2,	" 566	"	"	"	19,810
July, '68.	"	" 3,	" 884	"	"	"	30,940
Jan'y, '69.	"	" 4,	" 1,000	"	"	"	35,000
July, '69.	"	" 5,	" 1,000	"	"	"	35,000
							121,590

69 316,960
121,590

5% tax on $438,550—$21,927 50

The other bonds of the series remained in the hands of the company unsold.

(Endorsed:) 8th dist., Tenn. Memphis & Charleston R. R. Co. Statement of tax on coupons due U. S. Gov't Nov. 17th, 1869, a'p'ng, letter Jan'y 15th, '70.

MEMPHIS AND CHARLESTON RAILROAD,
TREASURER'S OFFICE, (GEO. ROBERTSON, Treas.,)
Memphis, Tenn., April 25th, 1870.

Hon. J. W. DOUGLASS,
Ass't Com'r Revenue Department, Washington City:

SIR: The contents of your several letters to the revenue officers of this city in relation to the indebtedness of this co. to the U. S. on acc't of taxes on coupons have been made known to us, and we now hasten to reply.

70 We are now and have ever been willing to pay whatever under the laws of the land we are liable for, and want no proceedings to force us to pay what we justly owe.

We have already paid twelve thousand and thirty-eight $\frac{25}{100}$ dollars, ($12,038.25), and now propose as a compromise to pay twelve thousand dollars ($12,000.00) additional as twelve penalties of one thousand dollars each for twelve failures, to make returns of interest on bonds of the co., if you will receipt us in full, for all past due taxes, fines, penalties, etc., due the United States, arising out of our failure to report payment of coupons at the proper time, provided said payment is to be a final settlement of the whole matter in controversy.

Respectfully,

MEM. & CHA'L'S. R. R. CO.
By M. J. WICKS, *Pres't.*

(Endorsed:) 528/. Dist. Tennessee. Assessor's office, Memphis, Tenn, April 25th, 1870. The undersigned respectfully recommend a favorable consideration of the within proposition of the Hon. Commissioner of Internal Revenue. A. B. Newkirk, U. S. assessor; R.
71 F. Patterson, collector; J. W. Purviance, U. S. dis't att'y.

TREASURY DEPARTMENT,
OFFICE OF INTERNAL REVENUE,
Washington, August 23d, 1870.

SIR: I have the honor to submit for your consideration the record in the following case, and to ask your approval of my decision in accepting the terms of compromise hereinafter specified. The papers relating to the case are herewith transmitted for reference.

The Memphis & Charleston Railroad Company, reported by Robert F. Patterson, collector, 8th district, Tennessee, case No. 3898.

Charge or claim, failure to return interest:

Tax withheld, assessed at	$8,025 50
Tax accrued prior to 15 months	13,902 00
Assessed penalty	4,012 75
	$25,940 25

Terms of compromise offered:

Tax	$8,025 50
Assessed penalty	4,012 75
Specific penalty	12,000 00
	$24,000 00

72 Terms accepted:

Tax	$20,025 50
Assessed penalty	4,012 75
Specific penalty	
	$24,038 25

That is to say, the sum of twenty-four thousand and thirty-eight dollars and twenty-five cents and costs.

The Memphis & Charleston Railroad Company is charged with having neglected to return the interest on its bonds maturing from May, 1866, to July, 1869, as required by section 122, act of June 30th, 1864, the tax amounting to $21,927.50.

The company had a claim against the Post-Office Department for

$20,897.40 for carrying the mails before the war, and it is offered as an excuse for not making the returns mentioned above that it was waiting for a decision upon this claim.

An assessment was made against the company in January, 1870, covering the taxes falling due within fifteen months, to which time
73 the assessor was limited by sec. 20, act of June 30th, 1864, as amended.

The total amount assessed, including the fifty per cent. penalty for neglect, was $12,038.25.

The company being liable to twelve penalties of one thousand dollars each for failing to make return under sec. 122, as mentioned above, in twelve different instances, upon being notified of this liability, offer to pay the same without suit as a final settlement of the whole matter in controversy.

Assessor Newkirk, Collector Patterson, and U. S. Attorney Purviance, all recommend acceptance of the proposition. The Solicitor of Internal Revenue has filed a favorable opinion in the case, and, in view of the facts above stated, I have decided, with your advice and consent, to compromise the case upon the terms offered, with the further condition that the defendant pay whatever costs and expenses may have accrued, the whole amount to be received as tax.

Very respectfully,

J. W. DOUGLASS,
Acting Commissioner.

Hon. GEO. S. BOUTWELL,
Secretary of the Treasury.

74 (Endorsed:) Office of Internal Revenue, August 23d, 1870. J. W. Douglass, Acting Commissioner. Acceptance of offer in compromise in case of the Memphis and Charleston Railroad Company.

TREASURY DEPARTMENT,
August 24th, 1870.

SIR: I hereby approve the terms of compromise proposed in your letter of the 23d instant for the case of the Memphis & Charleston R. R. Co., 8th district Tennessee, to wit, the defendant to pay twenty-four thousand thirty-eight dollars and twenty-five cents ($24,038.25) as tax, together with costs.

Very respectfully,

W. A. RICHARDSON,
Acting Secretary of the Treasury.

Hon. J. W. DOUGLASS,
Acting Com'r Int. Revenue.

TREASURY DEPARTMENT,
OFFICE OF INTERNAL REVENUE,
Washington, August 27th, 1870.

75 SIR: I have considered the proposition submitted by the Memphis and Charleston Railroad Company for a compromise of the claims of the United States against said company by reason of its failure to make return of interest on its bonds maturing from May, 1866, to July, 1869, viz, payment of twenty-four thousand thirty-eight and $\frac{25}{100}$ dollars ($24,038.25), and I have decided, with the advice and consent of the Hon. Secretary of the Treasury, to accept the same as tax, the defendants to pay any costs legally accrued.

Please notify M. J. Wicks, esq., president of the company, of this

acceptance, and upon full compliance therewith dismiss the case, reporting your action.

Very respectfully,

J. W. DOUGLASS,
Acting Commissioner.
T. A. C.

R. F. PATTERSON, Esq.,
Collector 8th Dist., Memphis, Tenn.

(Endorsed:) Office of Internal Revenue, August 27th, 1870. J. W. Douglass, Acting Commissioner. Accepting compromise offer of Memphis and Charleston R. R. Co.

76 UNITED STATES INTERNAL REVENUE,
COLLECTOR'S OFFICE, 8TH DISTRICT, TENN.,
Memphis, Sept. 26th, 1870.

SIR: Referring to your letter of the 27th ult., (I. A. B. A. H. S.) accepting the proposition in compromise in the case of the Memphis & Charleston R. R. Co., viz, the payment of $24,038.25 for failure to make return of interest on bonds maturing from May, 1866, to July, 1869, I have the honor to state that the matter has been settled by the payment of $12,000, being the amount unpaid, the remainder having been collected on monthly list from the assessor's office, and the case is dismissed. The $12,000 collected will be reported to the assessor on Form 58 with the unassessed penalties collected this month.

Very respectfully,

R. F. PATTERSON, *Collector.*

Hon. C. DELANO,
Commissioner, &c., Washington, D. C.

77 (Endorsed:) No. 2375. R. F. Patterson, coll. of int. revenue, 8th district, Tennessee. Dated Memphis, September 26th 1870. In relation to compromise case of the Memphis & Charleston R. R. Co.

The plaintiffs here rested their case.

The defendant then introduced evidence tending to prove that a short time prior to June 6th, 1862, the entire line of the railroad of the defendant, together with all its locomotives, rolling-stock, and equipment, was within the military lines of the armies of the Confederate States, and was in the actual possession and use of the said military authorities, and being operated and used by them as a military road, and that while it was so used and held, and a few days before the 6th day of June, 1862, in anticipation of the seizure of the said railroad, &c., by the military forces of the United States, all of the rolling-stock, locomotives, and equipments of defendant's said railroad, together with all its officers and all the employés in charge thereof, were ordered south by the Confederate military authorities, and forcibly removed south under an escort of Confederate soldiers; and kept south within the
78 actual lines of occupation of the Confederate armies until after the close of the war in 1865; that from the time of being ordered and forced south as stated until the close of the war the only income or earnings of the defendant was derived from the hire of its locomotives and rolling-stock in the Southern States in the possession and control of the Confederate military authorities, and consisted altogether of Confederate treasury notes, that being the only currency in circula-

tion, and the only money that was permitted by said military authorities to be received for the use of the said property; that about the 6th day of June, 1862, defendant's said line of railroad and all of its property, except that taken south as before stated, was forcibly taken possession of by the military authorities of the United States and kept and used by them as a military road until late in September, 1865, when it was delivered back to the defendant in a greatly damaged condition; that defendant had never been paid anything for the use of its railroad and property by the military authorities of the United States, nor for the damage to its said property while in their possession and use—that the only dividends declared or paid by defendant between June
79 1st, 1862, and January 1st, 1866, was one of four per cent. on its capital stock declared March 17th, 1863; that by the express terms of the resolution of the board of directors declaring the dividend it was made payable only in Confederate money, that being the only money held by the company; that said dividends amounted to $202,509.00, of which $155,425.67 was paid in Confederate treasury notes and the remainder of $57,083.33 was never called for, but is still held by the defendant in Confederate treasury notes; that of the interest coupons maturing Nov. 1st, 1862, May 1st, 1863, November 1st, 1863, and May 1st, 1864, the defendant paid $88,935.00 in Confederate treasury notes prior to the close of the war; that at the dates of the payments in Confederate treasury notes of the said dividend and interest coupons the value of such Confederate treasury notes was greatly depreciated below legal tender.

The defendants then proved and read in evidence the following receipt of R. F. Patterson, rev. collector, as follows, viz:

"UNITED STATES INTERNAL REVENUE,
"COLLECTOR'S OFFICE, 8TH DISTRICT, TENN.,
"*Memphis, Sept.* 24, 1870.

"Received of M. J. Wicks, president Memphis and Charleston Railroad Company, twelve thousand dollars, being balance due on twenty-four thousand thirty-eight and $\frac{25}{100}$ dollars for penalty of neglect to make returns of interest on its bonds maturing from May, 1866
80 to July, 1869, agree'bly to instructions from Commissioner under date of August 27th, 1870, accepting proposition in compromise made to him by Memphis & Charleston Railroad Company.
"$12,000.00.] R. F. PATTERSON, *Collector*."

The defendant then introduced evidence of the officers of its company tending to prove that they understood the settlement and compromise evidenced by the receipt of R. F. Patterson, of date Sept. 24th, 1870, to be a settlement of all taxes, fines, and penalties due the United States from the defendant. To the introduction of which the plaintiffs, by attorney, then objected, and the objection being overruled, exception was then & there taken.

The defendant also offered evidence tending to prove that all of said interest coupons falling due from November 1st, 1862, to January 1st, 1866, inclusive, except the $88,935.00 paid in Confederate treasury notes as before stated and $13,370.00 paid in legal-tender currency, were paid after January 1st, 1866, in money, or funded after that date in second-mortgage bonds of the company, and that the amount of such interest coupons which were funded into second-mortgage bonds exceeded $100,000.00. The defendant offered evidence tending to prove that a portion of the coupons maturing prior to January, 1866, had been

81 paid by the company, and the tax due on same entered to the credit of the United States on the books of the company, and should have been expressed in the statement of taxes due furnished the Commissioner of Internal Revenue by Maj. Wicks. The proof further tended to show that the coupons maturing prior to January 1st, 1866, formed a part of the aggregate amount reported due by Maj. Wicks. To the introduction of which testimony the U. S. attorney objected at the time, and the court overruled said objection and allowed the evidence to go to the jury. And defendants then introduced the depositions of Geo. Robertson, S. R. Cruse, Sam'l Tate, and R. F. Patterson.

STATE OF TENNESSEE,
Shelby County:

United States circuit court for the western district of Tennessee.

THE UNITED STATES
vs.
THE MEMPHIS & CHARLESTON RAILROAD Company.

Depositions of George Robertson, Samuel R. Cruse, Sam. Tate, and R. F. Patterson, taken on the 13th, 14th, and 15th of Jan'y, 1879, respectively, at the offices of the Memphis & Charleston Railroad; of Humes & Poston, and of R. F. Patterson, on examination-in-chief by the counsel of the railroad and the cross-question by the counsel for the government.

Said witnesses, being duly sworn, deposed as follows:

82 1st int'g. (to GEORGE ROBERTSON). State your age, residence, and what connection you had with the Memphis & Charleston Railroad Company from June 1st, 1862, up to 1870; also, what became of the road from June 6th, 1862, to November, 1865; and, for the same period, what became of the rolling-stock and of the officers.

Ans. I am 58 years of age. I live in Memphis. For several years prior to 1860 I was secretary of the Memphis and Charleston Railroad, western division, and from that date was secretary and treasurer of the western division of said railroad company until 1872. The United States military authorities took possession of the road about June 6th, 1862, to the exclusion of the company and its officers, and run it as a government road until the fall of 1865, using rolling-stock of the company that they had captured on the eastern division. The western division comprehended that section of the road from Memphis to Bear Creek on the dividing line between the States of Mississippi and Alabama. The eastern division comprehended that section of the road from Bear Creek to Stevenson, Alabama. The western division of the road and the country in which it is situated were in the lines and under the control of the Confederate military authorities until about June 6th, 1862. Just before the last date the Confederate military authori-

83 ties compelled the removal of all the rolling-stock on the western division further south, within their lines, and on other roads, and although they compelled the retention of the rolling-stock within their lines, yet they permitted the officers of the road to hire it out to other roads. During the latter part of 1862, and the years 1863–1864, up to about the middle of 1865, or the fall of that year, the officers of

the company did hire out the rolling-stock, receiving in payment the only currency or money then and there in use, which was Confederate States treasury notes. With that currency, from January, 1863 to June, 1865, the company paid due coupons on the bonds issued by it before the war, and the coupons thus paid amounted to $88,935.00, as shown by the statement hereto attached marked Exhibit A.

2nd int'g. Where were the officers of the road in control of the rolling-stock sent south during the period from June 6th, 1862, to the summer or fall of 1865? Did the company, during the period just stated, have or acquire any other kind of money or currency than the Confederate treasury notes? Could they have compelled or exacted the payment of any other currency or money for the stock so hired out? Did they during the same period have any other source or means of acquiring any means or money than the hiring out of the rolling-stock sent farther south, as you have stated?

84 Ans. They were with the rolling-stock so sent south, controlling and hiring it out and taking care of it. They did not require during said period any other money or currency than Confederate treasury notes, and could not. They could not have compelled nor exacted any other money or currency for the rolling-stock so hired out. They had no other source or means of acquiring any money or means than the hiring out of the rolling-stock sent further south as I have before stated.

3rd in'g. Would or would not the Confederate Government, or its military authorities, have permitted the officers of said company to demand any other money or currency in payment for the use of said rolling-stock than the Confederate notes, and did they not compel the acceptance of said Confederate treasury notes in payment of all debts from one person to another?

Ans. They would not have permitted the officers of said company to demand any other money or currency in payment for the use of said rolling-stock than the Confederate treasury notes. It would have been a penal offence, and they would have confiscated the stock and

85 taken it. They did by penal laws compel the acceptance thereof.

4th int'g. Please state all you know about the declaration of any dividends by said company during the same period.

Ans. Out of these same Confederate funds acquired by the hiring out of this rolling-stock above mentioned a dividend of four per cent. was declared, expressly payable in Confederate treasury notes, as the only description of funds on hand. The resolution is in the following words: "Resolved that a dividend of 4 per cent., or $1.00 per share, of the capital stock of this company be this day declared, payable in Confederate treasury notes (that description of funds being on hand) on the 15th day of April next." This resolution was passed 17th of March, 1863, being then within the Confederate military lines. Of the dividend so declared there was paid during said period, and in Confederate treasury notes, the sum of $155,425.67, and the balance, $57,083.33, never was paid, but is still on hand in the same fund, and was charged off to profit and loss.

86 5th int'g. Were you not cognizant of the negotiation between Maj. Wicks, as president of the Mem. & Chas. R. R. Co., in 1870, and Mr. Douglass, Internal Revenue Commissioner? If so, please state your understanding.

Ans. I was cognizant of the negotiation between Major Wicks, as president of the Mem. &. Chas. R. R. Co., in 1870, and Mr. Douglass, Internal Revenue Commissioner. Major Wicks read me his letter to

Douglass offering the compromise, and it was my understanding and Major Wicks' that his (Wicks') proposition to Douglass was to be in full of all taxes then in ar'ears and up to date on account of coupons paid on our bonds.

Examination-in-chief adjourned, to be continued or closed, as desired, in the next few days.

Jan'y 13th, 1879.

L. W. HUMES, *U. S. Com.*

And further saith not.

GEO. ROBINSON.

Sub. & sworn to before me this Jan'y 20, '79.

{SEAL.} L. W. HUMES, *U. S. Com.*

87 (Plaintiff excepts to answer to inter. 5th for this reason, that the same is incompetent, the witnesses undertaking to give the understanding of Maj. Wicks. The letter mentioned is the best evidence of its contents.—W. W. MURRAY, *U. S. Attorney.*)

1st int'g (to SAMUEL CRUSE). State your age and place of residence; how long have you been in the employ of the Memphis and Charleston R. R. Co., and in what capacity or capacities. In whose hands and control was the Mem. & Charleston Railroad from Memphis, its western terminus, to Stevenson, its eastern terminus, during the period extending from June 6th, 1862, to November, 1865? What occasioned its being so controlled? During the same period did the said company acquire any funds or have any income? If so, how and where and from what funds did they make any income; what amount of coupons did the company pay on its bonds, and in what funds, and where at?

88 Tell, also, of any dividends declared and paid during the same period. Could the company have paid the coupons and dividends in any other funds; if not, why not?

1st. Ans. My age is 49; place of residence, Memphis. I was in the employment of the M. & C. R. R. Co. from Decem., 1865, to June, 1872, as sec'y and treas. of the eastern division.

The M. & C. R. R. was, with the exception of brief period in 1862 & 1863, in the hands and under the control of the U. S. forces from Memphis & Stevenson, having been taken possession of by said U. S. troops.

During all that period the only revenue of the company was derived from the rental of its cars, engines, &c., &c., to the several roads within the Confederate lines. The company during that time paid some of its matured coupons, as appears in detail from a statement herewith marked Exhibit A, all of which was paid in Confederate money.

There was one dividend declared in March, 1863, payable as expressly stated by resolution of the board in Confederate money.

The company could have paid its coupons maturing at that time & the dividend declared only in Confederate money, because it had no other.

89 2nd int'g. What other source of revenue or income did the company have, if any, during the period from 6th of June, 1862, to the summer or fall of 1865? State to what railroads the rolling-stock of your company sent south from Memphis by the Confederate States authorities in June, 1862, was hired. Why was it that your company received Confederate treasury notes for the hire of the rolling-stock? Was there any other dividend declared by your company than that of March 17th, 1863, from May, 1862, to May, 1866?

Ans. The company had no other source of revenue except the rental of its property from June 6th, 1862, to autum' of 1865. The railroads to whom the property was hired was in the States of Miss., Ala., Georgia, & South Carolina. The company rec'd Confederate States treas. notes because there was no other currency in circulation, because they were by law a legal tender for all debts public & private, and it was a penal offence to refuse them,

(Answer to int. 2 excepted to as incompetent and irrelevant.—W. W. MURRAY, *U. S. Attorney.*)

90 3rd int'g. Please state whether compromise made and consummated in 1870, between Mr. Douglass, Internal Revenue Commissioner of the United States Government, and Major M. J. Wicks, as president and on behalf of the Mem. & Charleston R. R. Co., for the settlement of arrears of taxes on coupons paid by the company, embraced only the coupons paid in 1866, up to May of that year, or did it embrace all back taxes on account of coupons. State the reasons and facts on which you base your testimony touching this matter.

Ans. The compromise was intended to cover all back taxes whatever on coupons claimed by the U. S. Rev. Dep't. I make this statement because I know that M. J. Wicks, the then pres't of the M. & C. R. R. Co., so considered it, and reported to the board of directors that this matter which had given much trouble and uneasiness had been settled finally. And besides, I have seen and read a letter from said Wicks to Commissioner Douglass which can bear no other construction. Moreover, in a conversation with Gen'l R. F. Patterson, collector of internal revenue for western district of Tennessee, I understood him to say that such was his opinion also.

91 Examination-in-chief adjourned to be continued or closed, as desired, in the next few days. Jan'y 13th, 1879.

L. W. HUMES, *U. S. Com.*

(Answer to int. 3 excepted as incompetant. The letter mentioned is the best evidence of its contents. The statements made by Maj. Wicks and the opinion of Gen'l Patterson is incompetant for any purpose.—W. W. MURRAY, *U. S. Att'y.*)

Cross-examination:

1st. int. (to SAMUEL R. CRUSE). Please state the amount of any and all payments made by the Memphis and Charleston Railroad Company on account of bonds, coupons, or dividends, from July 1st, 1862, to Jan'y 1st, 1863, the kind of money paid, and the time of payment.

Ans. The amount paid on coupons within those dates was twenty-six hundred and ninety-five dollars. The am't was paid by the People's Bank of Charleston, S. C., in C. S. treas. notes, the banks at that
92 time paying out no other currency. There was no payment made on bonds, as they did not mature until May 1st, 1880.

Paid on dividends, eastern division, at Huntsville.....	$4,518 32
" " " " " " Memphis.....	318 64

And further deponent saith not.

S. R. CRUSE.

Sub. & sworn to before me this Jan'y 20, '79.

[SEAL.] L. W. HUMES, *U. S. Com.*

93 Ex. A.—*Statement of Memphis & Charleston R. R. Co. coupons paid by said company during the period embraced between January 1st, 1866, & May 1st, 1866, showing in detail dates of payment and the numbers and maturity of the coupons paid.*

1863.											
Jan'y	31.	6	Coupons,	No.	15,	due	Novem.	1st,	1861	210	
		34	"	"	16,	"	May	"	1862	1,190	
		48	"	"	17,	"	Novem.	"	"	1,680	
											3,080
March	31.	2	"	"	14,	"	May	"	1861	70	
		8	"	"	15,	"	Nov.	"	"	280	
		580	"	"	16,	"	May	"	1862	20,300	
		2	"	"	17,	"	Nov.	"	"	70	
		1	"	"	14,	"	May	"	1861	35	
		1	"	"	15,	"	Nov.	"	"	35	
		243	"	"	16,	"	May	"	1862	8,505	
											29,295
April	30.	4	"	"	12,	"	"	"	1860	140	
		6	"	"	15,	"	Nov.	"	1861	210	
		75	"	"	16,	"	May	"	1862	2,625	
		580	"	"	17,	"	Nov.	"	1862	20,300	
		225	"	"	18,	"	May	"	1863	7,875	
		7	"	"	16,	"	"	"	1862	245	
		245	"	"	17,	"	Nov.	"	"	8,575	
											39,970
May	31.	12	"	"	16,	"	May	"	"	420	
		7	"	"	17,	"	Nov.	"	"	245	
		31	"	"	18,	"	May	"	1863	1,085	
											1,750
Novem.	9.	1	"	"	16,	"	"	"	1862	35	
		1	"	"	17,	"	Nov.	"	"	35	
											70
1864.											
March	17.	6	"	"	16,	"	May	"	"	210	
		11	"	"	17,	"	Nov.	"	"	385	
		191	"	"	18,	"	May	"	1863	6,685	
		48	"	"	19,	"	Nov.	"	"	1,680	
		4	"	"	17,	"	"	"	1862	140	
		139	"	"	18,	"	May	"	1863	4,865	
		2	"	"	19,	"	Nov.	"	"	70	
											14,035
July	31.	11	" paid by People's Bank, of Charleston, S. C., & lost in transmission, hence the numbers & maturity of the said coupons are not known								385
1865.											
June	30.	10 coupons, No. 16, due May 1st, 1862									350
		Forward									88,935
94		Amount b't forward									88,935
1865.											
Sept.	30.	198 coupons, the numbers & maturity not recorded								6,930	
Oct.	31.	50	"	"	"	"	"	"	"	1,750	
		2	"	No.	19,	due	Novem.	1st,	1863	70	
		1	"	"	18,	"	May	"	"	35	
		1	"	"	19,	"	Novem.	"	"	35	
		1	"	"	20,	"	May	"	1864	35	
		1	"	"	21,	"	Novem.	"	"	35	
		1	"	"	22,	"	May	"	1865	35	
		1	"	"	23,	"	Novem.	"	"	35	
		3	"	"	17,	"	"	"	1862	105	
		4	"	"	18,	"	May	"	1863	140	
		17	"	"	19,	"	Novem.	"	"	595	
		40	"	"	20,	"	May	"	1864	1,400	
		18	"	"	21,	"	Novem.	"	"	630	
											11,830

Dec.	31.	13	"	"	20,	"	May	"	"	.....	455	
		9	"	"	21,	"	Novem.	"	"	.....	315	
		13	"	"	22,	"	May	"	1865	.....	455	
		9	"	"	23,	"	Novem.	"	"	.....	315	
												1,540
1866.												
Jan'y	12.	4	"	"	19,	"	"	"	1863	.....	140	
		4	"	"	20,	"	May	"	1864	.....	140	
		4	"	"	21,	"	Novem.	"	"	.....	140	
		4	"	"	22,	"	May	"	1865	.....	140	
		4	"	"	23,	"	Novem.	"	"	.....	140	
"	15.	4	"	"	23,	"	"	"	"	.....	140	
												840
March	30.	2	"	"	16,	"	May	"	1862	.....	70	
		14	"	"	17,	"	Novem.	"	"	.....	490	
		58	"	"	18,	"	May	"	1863	.....	2,030	
		262	"	"	19,	"	Novem.	"	"	.....	9,170	
		252	"	"	20,	"	May	"	1864	.....	8,820	
		160	"	"	21,	"	Novem.	"	"	.....	5,600	
		56	"	"	22,	"	May	"	1865	.....	1,960	
		8	"	"	23,	"	Novem.	"	"	.....	280	
		6	"	"	24,	"	May	"	1866	.....	210	
												28,630
"	29.	3	"	"	18,	"	"	"	1863	.....	105	
		3	"	"	19,	"	Novem.	"	"	.....	105	
		3	"	"	20,	"	May	"	1864	.....	105	
		3	"	"	21,	"	Novem.	"	"	.....	105	
		3	"	"	22,	"	May	"	1865	.....	105	
		3	"	"	23,	"	Novem.	"	"	.....	105	
												630
					Forward	.....						132,405
95					Amount bro't forward	.....						132,405
1866.												
April	12.	10 coupons, No. 19, due Novem. 1st, 1863								.....	350	
		4	"	"	20,	"	May	"	1864	.....	140	
		6	"	"	21,	"	Novem.	"	"	.....	210	
		39	"	"	22,	"	May	"	1865	.....	1,365	
		27	"	"	23,	"	Novem.	"	"	.....	945	
												3,010
"	30.	1	"	"	15,	"	"	"	1861	.....	35	
		1	"	"	16,	"	May	"	1862	.....	35	
		1	"	"	17,	"	Novem.	"	"	.....	35	
		6	"	"	18,	"	May	"	1863	.....	210	
		13	"	"	19,	"	Novem.	"	"	.....	455	
		9	"	"	20,	"	May	"	1864	.....	315	
		9	"	"	21,	"	Novem.	"	"	.....	315	
		14	"	"	22,	"	May	"	1865	.....	490	
		23	"	"	23,	"	Novem.	"	"	.....	805	
												2,695
[SEAL.]												$138,110

RECAPITULATION.

Coupons matured	May	1st, 1860	.....	140
" "	"	" 1861	.....	105
" "	Novem.	" "	.....	770
" "	May	" 1862	.....	33,985
" "	Novem.	" "	.....	32,060
" "	May	" 1863	.....	23,030
" "	Novem.	" "	.....	12,670
" "	May	" 1864	.....	11,410
" "	Novem.	" "	.....	7,350
" "	May	" 1865	.....	4,550
" "	Novem.,	"	.....	2,765
" "	May,	1866	.....	210
Numbers & maturity not known	.....		385 6,930 1,750	
			9,065	
				138,110

96 *Extract from the books of the Memphis & Charleston R. R. Company showing U. S. tax on coupons paid by said co. on dates specified below, which coupons matured before and during the war and subsequent thereto, and placed to credit of the U. S. government.*

1867.				
July	31.	Tax on 1st m. coupons		551 25
Novem.	30.	" " do		3 50
Decem.	31.	" " do	4,264 05	
"	"	" " 2nd m. coupons		42
"	"	" " 1st " "		339 50
1868.				
Jan'y	"	" " " "	2,569	
"	"	" " 2nd " "		936 25
"	"	" " 1st " "		246 75
Feb'y	29.	" " " "		15 75
March	20.	" " " "		94 50
"	"	" " 2 " "		7
April	14.	" " 1 " "		143 50
"	"	" " 2 " "		17 50
"	30.	" " 1 " "		24 50
May	20.	" " " "		350
"	"	" " 2 " "		24 50
"	31.	" " 1 " "		3 50
June	8.	" " " "		112
"	"	" " " "	1,447 25	
July	22.	" " " "		603 75
"	"	" " 2 " "		3 50
Aug't	24.	" " 1 " "		124 25
"	"	" " 2 " "	1,456	
Septem.	22.	" " 1 " "		24 50
"	"	" " 2 " "		17 50
Oct.	13.	" " 1 " "		35 00
Novem.	21.	" " " "		220 50
Decem.	19.	" " " "	1,571 50	
"	"	" " 2 " "		57 75
"	31.	" " 1 " "		56
1869.				
Jan'y	20.	" " 2 " "		3 50
"	"	" " 1 " "		161
Feb'y	18.	" " 2 " "	1,613 50	
"	"	" " 1 " "		127 75
March	11.	" " 2 " "		43 75
		Forward	17,312 05	
97	1869.	Amount bro't forward	$17,312 05	
	March	11. Tax on 1st m. coupons		80 50
	"	" " " " "		26 25
	22.	" " " " "		5 25
	"	" " " " "		43 75
April	30.	" " " " "		17 50
May	12.	" " " " "		19 25
	"	" " 2nd " "	1,806	
	31.	" " 1 " "		36 75
June	12.	" " " " "		10 50
	30.	" " " " "		194 25
July	19.	" " " " "	1,554	
Aug.	11.	" " 2 " "		141 75
"	"	" " 1 " "		28
Septem.	14.	" " " " "		47 25
"	"	" " 2 " "		5 25
Oct.	31.	" " 1 " "		129 50
"	"	" " 2 " "		17 50
"	"	" " 1 " "		40 25
Novem.	30.	" " 2 " "		80 50
"	"	" " 1 " "		1,146 25
		Making a total of	$22,742 30	

Which am't was transferred from the Huntsville office, on the books of which the above collections were made, to the Memphis office to be used in settlement of the tax due the U. S. Government on the basis of the agreement between Commissioner Douglass & M. J. Wicks, president of the M. & C. R. R. Co.

98 Interrogatory to Colonel SAMUEL TATE, he having been first duly sworn to speak the truth, the whole truth, and nothing but the truth:

1st int'g. State your age, residence, and former connection with the Memphis and Charleston Railroad Company, from January, 1862, to the summer of 1865. Give the history of the road, its officers, and rolling-stock, and its financial affairs and doings during said period.

Ans. I am of lawful age, being 61 years old at my last birthday. I reside in Memphis. I was the president of the Memphis and Charleston R. R. Co. from April, 1854, to May, 1868, and was in the active discharge of my duties as such, and in the actual control of all its operations as its chief executive officer during that whole period. On the 11th day of April, 1862, the military forces of the United States captured and took possession of the eastern division of the road at Huntsville, Alabama, and with the road the rolling-stock of the company on the eastern division, and this control never passed back to the company until after the close of the war in 1865. Also, from some
99 time in April, 1862, the western division of the road, although not taken from the officers of the company, was run under the control of the military superintendent of the Confederate States, appointed and put in control by General Beauregard, whose army and military control was then in and embraced the western division. About three days before the 6th day of June, 1862 (the day of the capture of Memphis by the United States military forces), the officers and rolling-stock of the western division of the road were by order of General Beauregard and under military escort removed south, on other roads within the lines of the Confederate forces, and were kept there by military power until the end of the war. During this period the Confederate military authorities controlled the rolling-stock and officers in charge of it, directing and ordering this rolling-stock to be hired to different roads designated by them, but permitting the officers to collect the hire of the rolling-stock from those different roads in Confederate treasury notes, but no other currency. A military order was issued by Gen'l Beauregard compelling every person to receive Confederate treasury notes for all debts and liabilities, and this contin-
100 ued during the whole period. The only means the company acquired or could have acquired during this period were these notes from the hiring this rolling-stock. With them the coupons mentioned by Robertson and Cruse were paid in the Confederate military lines and the dividend declared. Such rolling-stock as was not designated to be hired to particular roads was left to be hired by the officers of the road, but the hire to be paid in Confederate treasury notes. The military superintendent when this rolling-stock was removed south was Mr. R. B. Hurt, of Jackson, Tennessee, who was appointed by Gen'l Beauregard. I have examined the depositions of George Robertson and Sam'l R. Cruse, treasurer, on the subject of payments of coupons and dividen's, and confirm the same as taken from the books of the company.

Examination-in-chief adjourned, to be continued or closed, as desired, in the next few days.

Jan'y 14th, 1879.

L. W. HUMES,
U. S. Com.

And further saith not.

SAM. TATE.

Sub. & sworn to before me this Jan'y 20, '79.
[SEAL.]

L. W. HUMES,
U. S. Com.

101 (Except to the entire statement made the witness Tate, as the same is irrelevant and incompetant.—W. W. MURRAY, *U. S. Attorney.*

1st interrogatory (to R. F. PATTERSON). State your age, residence, and connection with the Government of the United States from 1869 to the present. Did you not conduct the negotiation between Mr. Douglass, as Internal Revenue Commissioner of the United States, and Maj. M. J. Wicks, as president of the Memphis & Charl'ston Railroad Company, in the summer of 1870? If yea, please file with your deposition the originals or copies of all letters or communications or writings you have under your control touching this negotiation written by Mr. Douglass, or Maj. Wicks or yourself or any other person; please state whether it was not Maj. Wicks' proposition to pay the $12,000.00 as a compromise of all arrearages of taxes on all coupons paid prior to July, 1870. Was not this your understanding too?

102 Answer to 1st int'g. Name, R. F. Patterson; age, forty-five; residence, Memphis, Tenn.; have been collector of internal revenue 8th district Tenn. since May, 1869. I did not conduct the negotiation between Mr. Douglass, Commissioner of Internal Revenue of the United States, and Maj. M. J. Wicks, as pres't of the Memphis & Charleston Railroad Company, in the summer of 1870. It was done in the assessor's office. I received a letter from Commissioner Douglass dated August 27th, 1870, notifying me of the acceptance of the compromise proposed by Maj. Wicks, as pres't of said railroad company, a copy of which is filed with this deposition. I do not know what Maj. Wicks' intentions were as to his proposition, whether it was to cover all arrearages of taxes or not on all coupons paid prior to 1870.

Examination-in-chief adjourned, to be continued or closed, as desired, in the next few days.
Jan'y 15th, 1879.

L. W. HUMES,
U. S. Com.

And further saith not.

R. F. PATTERSON.

Sub. & sworn to before me this Jan'y 20, '79.
[SEAL.]

L. W. HUMES,
U. S. Com.

103 EX. A.—(Copy.) [H. H. S.

TREASURY DEPARTMENT,
OFFICE OF INTERNAL REVENUE,
Washington, Aug. 27th, 1870.

SIR: I have considered the proposition submitted by the Memphis and Charleston Railroad Company for a compromise of the claims of the United States against said company by reason of its failure to make return of interest on its bonds maturing from May, 1866, to June, 1869,

viz, payment of twenty-four thousand thirty-eight & $\frac{25}{100}$ dollars
[SEAL.] ($24,038.25), and I have decided, with the advice and consent of the Hon. Secretary of the Treasury, to accept the same as tax, the defendants to pay any cost legally accrued.

Please notify M. J. Wicks, esq., president of the company, of this acceptance, and upon full compliance therewith dismiss the case, reporting your action.

Very respectfully,

J. W. DOUGLASS,
Acting Commissioner.
T. A. S.

R. F. PATTERSON, Esq.,
Memphis, Collector 8th Dist. Tenn.

A correct copy.

R. F. PATTERSON, *Collector.*

104 The foregoing depositions were taken before me, and reduced to writing by the counsel on both sides, by some of the witnesses, and by me, all being done in my presence. And I certify that I am not interested in the cause, nor of kin or counsel to either of the parties, and that I sealed them up and delivered them to the clerk of the circuit court of the U. S. for the western district of Tennessee, at Memphis, without being altered after they were taken. Given under my hand the 20th day of January, 1879.

[SEAL.] LOWRY W. HUMES,
U. S. Com.

(Endorsed:) No. 2429. United States vs. Memphis & Charleston Railroad Company. Depositions of George Robertson, S. R. Cruse, Sam. Tate, and R. F. Patterson, opened at request of Humes & Poston, and depositions filed this Jan'y 21st, 1879. Bell W. Etheridge, clerk, H. E. Andrews, D. C.

This was all the evidence in the case.

105 The plaintiffs, by att'y, requested the court to charge the jury as follows, to wit:

This 1st instruction asked to be given by pl'f', and given, was as follows:

"1st. It is insisted by the defendant's counsel that the subject-matter of this suit was compromised in 1870, and that said compromise embraces the taxes sued for in this case. I charge you as a matter of law that there is nothing in the terms of the compromise relied on which will prevent the plaintiffs from recovering the taxes sued for in this case. The compromise only embraces the liability of the defendant for taxes, fines, and forfeitures from May, 1866, to July, 1869."

At the time of the giving of this 1st instruction as asked by the plaintiff the defendant objected and excepted to the giving of the same, and the court allowed said exception at the time and while the jury remained at the bar.

The plaintiff also asked the court to give the following instruction, and it was done:

"2nd. The defendant's counsel insists that a portion of the
106 interest on which a tax is claimed by the plaintiffs were funded in 2nd-mortgage bonds of the defendant company, and that such funding did not amount to a payment of such interest. If you find

that any of the interest on the bonds of the defendant on which a tax is claimed in this suit was so funded, and that it was optional with the holders of such interest coupons to have the same paid in cash or funded in 2nd-mortgage bonds at a discount, I charge you that if such holders of interest coupons took 2nd-mortgage bonds in preference to the cash, that it did amount to a payment, and the plaintiffs would be entitled to recover the tax claimed on the amount so funded."

At the time of the giving of this 2nd instruction by the court, as asked by the plaintiff, the defendant objected and excepted in law to the giving of the same, and the court allowed the exception at the time and while the jury remained at the bar.

The plaintiff also asked the following to be given, which was given:

"3d. If the jury find from the evidence that the defendant
107 paid prior to the commencement of this suit any amount of interest on coupon bonds issued by the defendant and falling due from July 1st, 1862, to November 30th, 1865, the plaintiffs would be entitled to recover 3 per cent. on the amount of such interest which fell due from July 1st, 1862, to June 30th, 1864, and 5 per cent. on the amount maturing from June 30th, 1864, to November 30th, 1865."

The plaintiff also asked the following to be given, which was refused:

"4th. If the jury find that the defendant declared a dividend in Confederate money in the year 1863, payable to its stockholders, and that all or any part of said dividend was paid in Confederate money in 1863, the plaintiffs would be entitled to recover 3 per cent. on the amount so paid."

The plaintiffs excepted at the time to the refusal of the court to give the instructions above asked, and plaintiffs' exception was allowed.

The defendant then requested the court to instruct the jury as follows, viz:

108 *Instructions asked by the def't and refused by the court.*

UNITED STATES
vs.
MEM. & CHAS. R. R. CO.

1ST. INST.—If the testimony proves, to the satisfaction of the jury, that the eastern division of the Memphis & Charleston Railroad, extending from Stephenson, Alabama, westwardly to the dividing line between the State of Alabama, with all the rolling-stock thereon, was captured, possessed, and operated by the military authorities of the United States (without compensation to the defendant company) from April, 1862, to September 12th, 1865, that the western division of said road, extending from the dividing line between Alabama and Mississippi to Memphis, Tennessee, with the surrounding and adjacent country, was occupied by the Confederate army under Gen'l Beauregard until June 6th, 1862, and from this last date to Sept. 12th, 1865, was captured, held, possessed, and operated by the Government of the United States by its military authorities, as captured property and without compensation to the defendant company; and, 3 or 4 days prior to the 6th of June, 1862, all the rolling-stock of the def' company on this western division and all the officers and employees of said company were, by an order
of Gen'l Beauregard, in command of the Confederate army, and
109 under his military escort, taken from the line of said railroad and moved south into the States of Mississippi, Alabama, Georgia, and South Carolina; and by said military power kept there within

the lines of actual occupation of the Confederate military authorities and armies from June, 1862, to the close of the war; and that said officers of said railroad company during this period were compelled by said Confederate military authorities to hire out said rolling-stock to such railroad companies as were within their said lines, and were compelled by the same authority to accept and receive for the hire of said rolling-stock only Confederate States treasury notes; and that under said compulsion the officers of said company did receive that currency, and had no other; and that while under such compulsion and within said Confederate military lines they paid $88,963 of their interest coupons on their time bonds of said company having more than one year to run to maturity, and they made said payments from July 1st, 1862, to the close of the war in 1865, then, on such payments of coupons, the said company would not be liable for the tax sued for in this case on the coupons so paid.

110 At the proper time, and before the court charged the jury, the defendant, by its counsel, asked the court to give the above instruction to the jury, but the court refused; to which refusal the defendant duly objected and excepted in law at the time, and the court allowed said exception.

At the proper time, in open court, after the evidence was all in, and before the court had charged the jury, and before the jury had retired, the defendant's counsel asked the court to give the jury the following instruction, No. 2:

"2 IN.—If, under the same circumstances, said company declared a dividend in March, 1863, within the Confederate lines, payable out of the Confederate notes on hand and acquired as aforesaid, said company is not liable for any tax on such dividend."

The court refused to give this instruction No. 2, and to this refusal the defendant duly and legally objected and excepted at the time of refusal, and the court allowed said exception.

Also, in open court, at the proper time, after the evidence was all in, and before the court had charged the jury, and before the jury
111 had retired to consider their verdict, the defendant, by its counsel, asked the court to give the jury the following instruction No. 3:

"3 IN.—The act of Congress of 1862, ch. , sec. , only improves a tax on such coupons as were actually by the defendant company paid while that act was in force and up to the passage of the act of 1864, ch. , section , and no recovery can be had on coupons which matured during this period but were not paid until after the act of 1864. But the tax on such coupons as became payable between the 30th of June, 1862, and 1st of July, 1864, and were not paid until after the latter date, became due under the act of 1864 if the coupons were paid prior to the passage of the act of 1866, ch. 184, and under the latter act if paid after its passage."

But the court refused to give this 3rd instruction of defendant to the jury; and the defendant, by its counsel, duly and legally objected and excepted in law to this refusal at the time, and said exception was allowed by the court.

Also, in open court, at the proper time, after the evidence was all in, and before the court had charged the jury, and before the jury
112 had retired to consider of their verdict, the defendant, by its counsel, asked the court to give the jury the following instruction, No. 4:

"4TH IN.—So too under the act of 1864 on the coupons which matured between 30th of June, 1864, the date of the passag' of that act,

and the 13th day of July, 1866, the date of the passage of the act of 1866, ch. 184, amendatory of the act of 1864, but which were not actually paid until after the passage of the act of 1866, the tax did not become due under the act of 1864, but under the act of 1866, and as no tax has been sued for under the act of 1866, the jury cannot find against defendant on any coupons that matured between the date of the passage of said act of 1864 and that of the act of 1866, unless they were actually paid prior to the passage of the act of 1866."

But the court refused to give this 4th instruction of defendant to the jury; and defendant, by its counsel, duly and legally objected, and excepted in law to this refusal at the time; and said exception was allowed by the court.

Also, in open court, at the proper time, after all the evidence was in, and before the court had charged the jury, and before the jury
113 had retired to consider of their verdict, the defendant, by its counsel, ask the court to give the jury the following instruction, numbered five:

"5TH IN.—The first count in the declaration alleges that the defendant company during the period of time from the 1st day of July, 1862, to the 1st day of December, 1865, owned and possessed, had the care, management, and control of, and operated said railroad; and that said road having been engaged in the employment and business of transporting passengers and property for hire, and in transporting the United States mails, acquired thereby net earnings from July 1st, 1862, to December 1st, 1865, amounting to $300,623.83, which defendant company used during that time in paying the interest coupons on the bonds of said company, and dividen's declared, also in construction and improvement of its said road beyond and in addition to the condition of said railroad on said 1st day of July, 1862, and thereby said defendant became subject to the payment of $11,735.82 as an internal-revenue tax on said payments to the United States Government. These allegations are so framed as to confine the government to the proof of taxes on coupons, dividends, and net earnings actually paid within the alleged period from July 1st, 1862, to December 1st, 1865, and the tax from July 1st, 1862, to June, 1864, is recoverable only under the act June 30, 1862, ch. , section , fixing the tax at 3 cents on the , and the tax from June, 1864, to December
114 1st, 1865, is only recoverable under the act of 1864, ch. , sec. 122, fixing it at 5 per. cent."

But the court refused to give this instruction numbered five to the jury as requested; and the defendant, by its counsel, duly and legally objected and excepted in law to this refusal at the time, and said exception was allowed.

Also, in open court, after the evidence was in, and before the court had charged the jury, and before the jury had retired to consider of their verdict, the defendant, by its counsel, asked the court to give to the jury following instruction, numbered six:

"6TH IN.—So too, the second court alleges, that defendant company from July the first, 1862, to July 1st, 1863, had owned, possessed, had the care, management, and control of said *of said* railroad, and employed the same for and during this time in carrying passengers and freight for hire and the United States mails, and the net earnings of this employment for this time amounted to $73,820.83, which sum was used by defendant in paying interest coupons on the time bonds of defendant, and dividends declared, and constructing improvements on said road beyond the condition of the same on July 1st, 1862,

115 and that defendant thereby became subject to pay as internal-revenue taxes the sum of $2,214.62 by law assessed against defendant. These allegations of the second count are so framed as to confine the government to *to* proof of taxes on coupons, dividends, and net earnings actually paid out within the alleged period from July 1st, 1862, to July 1st, 1863, and that this tax is recoverable only under the act of June 30th, 1862, ch. 119, section 81, fixing the tax at 3 per centum on the amount so paid out and when paid."

But the court refused to give said instruction numbered six as requested by the defendant, and the defendant then and there duly and legally objected and excepted in law to this refusal of the court, and the court allowed the exception at the time.

Also, in open court, after all the evidence was in and before the court had charged the jury, and before the jury had retired to consider their verdict, the defendant by its counsel, asked the court to give the jury instruction No. 7, following:

"7TH IN.—For the same reasons, the government must prove the tax on $90,930.00 alleged at $2,727.70 as having been earned and paid out in the period from July 1st, 1863, to June 30th, 1864, and under
116 said act of 1862, ch. 119, section 81, fixing the tax at 3 per centum on the amount so paid out, and when paid."

But the court refused to give said instruction No. 7, as requested by the defendant; and the defendant then and there duly and legally objected and excepted in law to this refusal, and the said exception was allowed by the court at the time.

Also, in open court, after all the evidence was in, and before the court had charged the jury, and before the jury had retired to consider of their verdict, the defendant, by its counsel, asked the court to give to the jury the following instruction, numbered eight:

"8TH IN.—For the same reasons the government must prove the tax on $90,580.00 alleged at $4,529.00 as having been earned and paid out in the period from June 30th, 1864, to June 30th, 1865, and under the act of 1864, ch. 173, section 122, fixing the tax at 5 per centum on the amount so paid out, and when paid."

But the court refused to give said instruction number 8, as requested by the defendant, and the defendant then and there objected
117 and duly and legally excepted, in law, to this refusal, and said exception was allowed at the time by the court.

Also, in open court, after all the evidence was in, and before the court had charged the jury, and before the jury had retired to consider of their verdict, the defendant, by its counsel, asked the court to give to the jury the following instruction, number nine:

"9TH IN.—For the same reasons, the government must prove the tax on $45,290.00 alleged at $2,264.50 as having been earned and paid out in the period of time from July 1st, 1865, to December 1st, 1865, and under the act of 1864, ch. 173, section 122, fixing the tax at 5 per centum on the amount so paid out, and when paid."

But the court refused to give said instruction No. 9, as requested by the defendant, and then and there the defendant duly and legally objected and excepted in law to this refusal, and the court allowed said exception at the time.

Also, in open court after all the evidence was in, and before the court had charged the jury, and before the jury had retired to consider of their verdict, the defendant, by its counsel, asked the court to give to the jury the following instruction, No. 11:

118 11TH IN.—The plea of accord and satisfaction filed and relied

on in this case is fully proved and entitles the defendant to a verdict against the whole claim sued for in this case."

But the court refused to give said instruction No. 11, as requested by the defendant, and the defendant then and there duly and legally excepted in law to this refusal, and the court allowed said exception at the time.

Also, in open court, after the evidence was all in, and before the court had charged the jury, and before the jury had retired to consider of their verdict, the defendant, by its counsel, asked the court to give to the jury the following instruction, numbered twelve:

"12TH IN.—As to all the coupons which fell due prior to December, 1865, and which were not paid until after that date, the tax on them cannot be recovered in this case.

"First. Because they were included in the compromise.

"Secondly. Because they are recoverable under the act of 1866, ch. 184, section 9, page 138, passed July 13th, 1866, and it is admitted by the government that nothing is sued for under that act.

119 "Thirdly. I ask the same instruction without the admission.

"Fourth. Whatever coupons fell due from July 1st, 1862, to December 1st, 1865, and which the proof shows were funded in second-mortgage bonds, were not so paid as to make them liable to the tax sued for in this case."

But the court refused to give said instruction No. 12, as requested by the defendant, and the defendant then and there duly and legally excepted in law to this refusal, and the court allowed the exception at the time.

Also, in open court, after the testimony was all in, and before the court had charged the jury, and before the jury had retired to consider of their verdict, the defendant, by its counsel, asked the court to give to the jury the following instruction, numbered thirteen:

"13TH IN.—The proof shows that between December 1st, 1865, and the first day of May, 1866, the company paid on coupons that fell due from July, 1862, to Nov., 1865, inclusive, the sum of $37,030.00,

120 and inasmuch as the declaration is for tax on coupons paid prior to 1st of December, 1865, the government cannot, in any event, recover the tax on this sum of $37,030.00 under this declaration."

But the court refused to give said instruction, and the defendant then and there excepted in law to this refusal, and the court allowed said exception at the time.

Also, in open court, after the evidence was all in, and before the court had charged the jury, and before the jury had retired to consider of their verdict, the defendant, by its counsel, asked the court to give to the jury the following instruction, numbered fourteen:

"14TH IN.—The tax on interest-coupons paid is a tax upon such coupons. If the company was unable to pay more than 40 per cent. on each coupon, or only the face amount in depreciated currency worth 40%, taken at par, or any other value less than par, then the recovery can only be the tax on such value."

But the court refused to give this instruction, as requested by the defendant, and the defendant then and there duly and legally

121 excepted to this refusal, and the court allowed such exception at the time.

Also, in open court, after all the evidence was in, and before the court had charged the jury, and before the jury had retired to consider of their verdict, the defendant, by its counsel, asked the court to give the following instruction, No. 15, to the jury:

"15TH IN.—If the jury find from the evidence that the only dividend declared by the defendant was on March 17th, 1863, and was expressly declared to be payable only in Confederate money, and that the earnings of the defendant, out of which it was declared, consisted altogether of said Confederate money, then no tax thereon can be recovered in this case."

But the court refused to give this instruction, as requested by the defendant, and the defendant then and there objected and excepted duly and legally in law to this refusal, and the court allowed this exception at the time.

Also, in open court, after all the evidence was in, and before the court had charged the jury, and before the jury had retired to
122 consider of their verdict, the defendant asked the court to give the instruction No. 16:

"16TH IN.—The declaration only alleges that the taxes due and unpaid were and amounted to the sum of $11,735.82, and the government cannot, on this declaration, recover, in any event, more than that amount on account of tax, together with interest, in the event the court should instruct the jury that interest is recoverable."

But the court refused to give this instruction No. 16, as requested by defendant, and defendant then and there excepted in law to this refusal, and the court allowed the exception at the time.

Also, in open court, after all the evidence was in, and before the court had charged the jury, and before the jury had retired to consider of their verdict, the defendant asked the court to give the following instruction, No. 17:

"17TH IN.—If the jury are satisfied from the testimony that, in fact, the coupons paid by defendant from January, 1866, to November, 1869, included coupons that matured from July, 1862, to January, 1866, as well as those maturing from January, 1866, to November, 1869, and constituted part of the coupons on which the taxes were due when the settlement and compromise was made with M. J. Wicks, as president of said company, then the compromise embraced the taxes due on all such coupons, and they will find for the defendant."

123 But the court refused to give this instruction as requested, and the defendant then and there objected and excepted in law duly and legally to this refusal, and the court allowed the exception at the time.

The court charged the jury as follows:

First. "It being a tax on the individuals holding the coupons and shares of stock levied on their incomes respectively, derived from this source, it would seem that the company could not claim exemption from its payment by reason of any supposed hardship growing out of the fact that its road-bed was in possession of the military authorities of the United States on the one hand, and its rolling stock under the control of the military authorities of the Confederate States on the other. The facts in proof show that, notwithstanding this unfortunate situation, the company made earnings, declared a dividend, and paid interest on its bonds; and it is on these the acts of Congress levy the tax. It is wholly immaterial from what source the money to pay the interest is derived, whether by borrowing it, earning it, or how else, it is subject to this tax."

Defendant, by its counsel, at the time of the delivery of the above charge, and before the jury left the bar to consider of their verdict, objected and excepted in law to the above instruction, and the exception was allowed.

124 Secondly. The court further charged the jury in the following terms:

"So too, it is immaterial from what source the dividends are earned, whether by employment in the service of a hostile government, or in some other way, whenever the earnings are made, and the dividend declared, the tax attaches to it as the property of the persons to whom it is paid."

Defendant in like manner, and at the same time before the jury had retired from the bar to consider of their verdict, excepted to the foregoing instruction, as not being the law of the case in this regard, and the exception was allowed by the court.

Thirdly. The court further instructed the jury as follows:

"The claim of the defendant, that it is not liable in this suit by reason of the facts shown to exist, growing out of the late war, is wholly untenable on another ground. Treating it as a direct tax on this corporation, there can be no doubt of the power of Congress to tax citizens of the Confederate States, whether they were adhering to the one side or the other, and all the property of every kind belonging to them, and these revenue laws under consideration operated throughout those States engaged in war against the United States, as well as the others; and the fact that the property taxed, or the citizen taxed, was en-
125 gaged in the war against the United States cannot in any way change this result. Nor can the fact that the United States was temporarily prevented by a paramount insurrectionary military force, hostile to its government, from enforcing these laws operate to release the tax, or exempt the defendant from its liability. It would be anomalous to hold otherwise; and, as we understand it, the Supreme Court has finally decided that the case, relied on by the learned counsel for the defendant to establish a contrary doctrine, have no application to the war between the United States and the Confederate States."

To this third instruction, last above quoted, the defendant by its counsel excepted in law when it was delivered to the jury, and while the jury remained at the bar, as not being the law, and the court allowed the exception at the time.

The court also gave to the jury in the course of his charge, the following instruction over the objection of the defendant, made known to the court at the time:

"The defendant relies upon an accord and satisfaction, and proves a compromise with the Treasury officials, which it insists precludes any demand for this tax. I think, after a careful consideration of all the facts and the correspondence relied on to show this satisfaction, that the taxes sued for in this suit were not in contemplation of the parties at the time, and are not at all affected by the agreement then
126 reached. But even if it could be said that the defendant had in view the settlement of the taxes now sued for, it is plain the Secretary of the Treasury and the Internal Revenue Commissioner have limited the compromise to the taxes on interest of bonds falling due after May 1st, 1866, and up to July, 1869."

Defendant, by its counsel, objected to the foregoing instruction, and excepted to it in law at the time of its delivery, and while the jury remained at the bar, and this exception was then tendered to and allowed by the court.

The court further charged the jury over the objection of the defendant, make known to the court duly and legally at the time, as follows:

"It is in proof that some of the coupons were not paid in cash, but were funded in second-mortgage bonds. It appears that the creditor

had his option to take payments in cash, or take these new bonds at a certain agreed discount. It was therefore substantially a payment in cash, and a reinvestment of the amount in the second-mortgage bonds. This can constitute no defense to this suit."

Defendant, by its counsel, excepted in law to the foregoing instruction at the time it was delivered to the jury, and while the jury remained at the bar, and the court heard and allowed said exception.

127 The court also charged the jury over the objection of the plaintiff, made known to the court at the time, as follows:

"That all payments made by the defendant in Confederate money, either on dividends or interest, the defendant is only liable to the tax on the legal-tender value of the Confederate money at the time the tax accrued."

To this instruction, when given, and while the jury remained at the bar, the plaintiff duly and legally excepted in law, and the court allowed the exception at the time.

Thereupon the jury retired to consider of their verdict.

And the district attorney now here presents his bill of exceptions, embodying the exceptions taken by him at the time to the refusal of the court to charge the jury as requested, and the defendant now here presents its bill of exceptions, embodying the exceptions taken by it during the progress of the trial; all of which being examined by the presiding judge is found correct, signed, sealed, and made a part of the record in this cause.

E. S. HAMMOND. [SEAL.]

(Endorsed:) No. 2429. Circuit court of the United States, western district of Tennessee. United States vs. The Memphis & Charleston R. R. Co. Bill of exceptions. Filed May 23d, 1879. Bell W. Etheridge, cl'k.

128 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States in and for the western district of Tennessee, greeting:

Because in the record and proceedings, as also in the rendition of a judgment of a plea, which is in the said circuit court, before you, between The United States, plaintiff, and The Memphis & Charleston Railroad Company, defendant, a manifest error hath happened, to the great damage of the said Memphis & Charleston Railroad Company, as by complaint appears: We being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, 1879, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court, at Mem-

phis, this 24th day of May, A. D. 1879, and 103rd of American Independence.

BELL W. ETHERIDGE, *Clerk*,
, *D. C.*

(Indorsed:) No. 2429. Circuit court of the United States, western district of Tennessee. The United States vs. The Memphis & Charleston Railroad Company. Writ of error. Issued the 24th day of May, A. D. 1879. B. W. Etheridge, clerk; H. E. Andrews, clerk; D. C.

129 Supreme Court of the United States.

Know all men by these presents that we, The Memphis & Charleston Railroad Company, principal, and Napoleon Hill, as surety, are held and firmly bound unto the United States, in the sum of twenty-three thousand & seventy-six $\frac{38}{100}$ dollars, to be paid to the said United States, to which payment well and truly to be made we bind ourselves, and each of us jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, dated this 24th day of May, 1879.

Whereas the above-named Memphis & Charleston Railroad Company hath prosecuted an appeal to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the circuit court of the United States for the western district of Tennessee:

Now, therefore, the consideration of this obligation is such that if the above-named Memphis & Charleston Railroad Company shall prosecute its said appeal to effect, and answer all costs and damages if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and virtue.

MEMPHIS & CHARLESTON RAILROAD CO., [SEAL.]
By HUMES & POSTON, *Att'ys.* [SEAL.]
NAPOLEON HILL. [SEAL.]

Acknowledged before me this 24 day of May, 1879.

BELL W. ETHERIDGE, *Clerk*,
, *D. C.*

130 (Endorsed:) No. 2429. Circuit court of the United States, western district of Tennessee. United States vs. The Memphis and Charleston R. R. Co. Appeal bond. Filed the 24th day of May, A. D. 1879. Bell W. Etheridge, clerk.

Bond approved and accepted as a good and sufficient supersedeas bond this May 24th, 1879.

E. S. HAMMOND.

131 UNITED STATES OF AMERICA.

To the United States, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday in October, 187 , pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the circuit and western district of Tennessee, wherein The Memphis and Charleston Railroad Company is *are* plaintiff and you are defendant in error, to show cause, if there be any, why the judgment in the said writ of error mentioned

should not be corrected, and speedy justice done to the parties in that behalf.

Witness the honorable E. S. Hammond, judge of the district court of the United States for the western district of Tennessee, this 24th day of May, 1879.

E. S. HAMMOND, *Judge.*

(Endorsed:) No. 2429. Circuit court of the United States, western district of Tennessee. The United States vs. The Memphis & Charleston R. R. Co. Citation. Filed the 24th day of May, A. D. 1879. B. W. Etheridge, clerk; H. E. Andrews, d. clerk.

132 THE UNITED STATES OF AMERICA,
Sixth Circuit and District of West Tennessee:

I, Bell W. Ethridge, clerk of the circuit court of the United States for said district of West Tennessee, do hereby certify that the paper hereto attached is a full, true, perfect, and correct copy of the original record and proceedings in said court as the same now appear of record and upon the files in my office in the following cause, to wit: United States vs. Memphis & Charleston Railroad Company.

In testimony whereof I have hereunto set my name and affixed the seal of said court, at office in the city of Memphis, this 4th day of February, A. D. 1880, and of the Independence of the United States the 104th year.

[SEAL.] BELL W. ETHERIDGE, *Clerk,*
, *D. C.*

(Indorsed:) No. 2429. Circuit court of the United States. District of West Tennessee. United States vs. Memphis & Charleston Railroad Company.

(Indorsement on cover:) No. 462. The Memphis & Charleston Railroad Company, plaintiff in error, vs. The United States. W. Tennessee C. C. U. S. Filed 7th February, 1880.

108-228

OFFICE SUPREME COURT U.S.
FILED
JAN 27 1893
JAMES H. McKENNEY, CLERK

In United States Supreme Court.

MEMPHIS & CHARLESTON R. R. CO.,
Plaintiff in Error,

—vs.—

THE UNITED STATES,
Defendant in Error.

No. 179

In Error from the Circuit Court of the United States for the District of West Tennessee.

BRIEF.

POSTON & POSTON,
W. Y. C. & L. W. HUMES,
Counsel for Plaintiff in Error.

S. C. TOOF & CO., PRS. & LITHS. MEMPHIS.

In United States Supreme Court.

MEMPHIS AND CHARLESTON RAILROAD COMPANY, PLAINTIFF IN ERROR,
VS.
THE UNITED STATES, DEFENDANT IN ERROR.
No. 179.

In Error from the Circuit Court of the United States for the District of West Tennessee.

This is a suit by the United States against the Memphis and Charleston Railroad Company, to recover the taxes alleged to be due by the company on the amount of interest coupons and dividends paid between July 1st, 1862, and January 1st, 1866, under the Revenue Acts of 1862, and 1864, and 1866. Judgment was rendered by the court on a verdict of a jury, for $11,513.19, on the 11th of March, 1879.

See record, p. 18.

The Memphis and Charleston Railroad extends from Memphis, Tennessee, eastwardly through West Tennessee to the western boundary line of the State of Mississippi, thence through the northern part of Mississippi to the western boundary of Alabama, thence eastwardly through the northern territory of Alabama to Stevenson, in Jackson county, Alabama. The whole line of this road, from January, 1862, to June, 1862, was in the possession and control of the military forces of the Confederate States

Government. On or about the 6th day of June, 1862, in anticipation of the seizure of said road by the military forces of the United States, all of the rolling stock, locomotives and equipments of the road, together with all its officers and employes in charge thereof, were ordered South by the Confederate military authorities, and *forcibly removed South under an escort of Confederate soldiers; and kept South within the actual lines of occupation of the Confederate armies until after the close of the war in 1865.* From the time of being thus ordered and forced South until the close of the war, the only income and earnings of the defendant were derived from the hire of its locomotives and rolling stock in the possession and control of the Confederate military authorities, and consisted entirely of Confederate treasury notes—the only money permitted by said military authorities to be received for the use of said property; that on June 6th, 1862, the defendant's said line of road and all its property, except that moved South as above shown, was forcibly seized by the United States military authorities, and by them held and used as a military road until late in September, 1865, when it was returned to defendant in a greatly damaged condition, and without compensation for its use or the damage to it; that on the 17th of March, 1863, within the Confederate lines, a resolution of the Board of Directors was passed declaring a four per cent. dividend on the capital stock and making the same payable, expressly and only, in Confederate money, that being the only money held by the company. The dividend so declared amounted to $202,509.00; of which, $155,426.65, was paid in Confederate treasury notes while the officers were in the Confederate lines, prior to 1865. The remaining, $57,083.33, was never called for, but

is still held in Confederate treasury notes; that of the interest coupons maturing November 1st, 1862, November 1st, 1863, and November 1st, 1864, defendant paid, in Confederate treasury notes, prior to their release from the control of the Confederate military authorities, $88,935.00, and the balance of $13,370.00 paid in legal tender currency, and $216,000.00 funded into second mortgage bonds were paid and funded after January 1st, 1866, and these balances were included in Major Wicks' statement, and formed a part of the aggregate reported by Wicks as due to the Commissioner of Internal Revenue, and settled in that compromise.

See record, pp. 26–27–28.

Geo. Robertson's dep., pp. 28–29.

S. R. Cruse's dep., pp. 30–31.

Sam'l Tate's dep., p. 35.

ASSIGNMENT OF ERRORS.

1st. The court erred in not giving the following instruction to the jury as requested by the defendant:

"If the testimony proves to the satisfaction of the jury that the Eastern Division of the Memphis & Charleston Railroad, extending from Stevenson, Alabama, westwardly to the dividing line between the States of Alabama and Mississippi, with all the rolling stock thereon was captured, possessed, and operated by the military authorities of the United States (without compensation to the defendant company) from April, 1862, to September 12, 1865; that the Western Division of said road, extending from the dividing line between Alabama and Mississippi to Memphis, Tennessee, was occupied by the Confederate army under General Beauregard until June 6, 1862, and from this last date

to September 12, 1865, was captured, held and operated by the Government of the United States by its military authorities as captured property and without compensation to the defendant company; and that three or four days prior to the 6th of June, 1862, all the rolling stock of the defendant company on the Western Division and all the officers and employes of said company were, by an order of General Beauregard, in command of the Confederate army, and under his military escort, taken from the line of said railroad and moved South into the States of Mississippi, Alabama, Georgia and South Carolina; and by said military power kept there within the lines of actual occupation of the Confederate military authorities and armies from June, 1862, to the close of the war; and that said officers of said railroad company during this period were compelled by the same authority to accept and receive for the hire of said rolling stock only Confederate treasury notes; and that under said compulsion and within said Confederate military lines they paid $88,963 of their interest coupons on the time bonds of said company, having more than one year to run to maturity, and they made said payments from July 1, 1862, to the close of the war in 1865; then on such payments of coupons the company would not be liable for the tax sued for in this case."

Second instruction asked and refused: "If under the same circumstances, said company declared a dividend in March, 1863, within the Confederate lines, payable out of the Confederate notes on hand and acquired as aforesaid, said company is not liable for any tax on such dividend."

Third instruction asked and refused: "The act of Congress of 1862, ch. 119, sec. 81, p. 469, only imposes a tax

on such coupons as were actually by the defendant company paid while that was in force, and up to the passage of the act of 1864, ch. , sec. , and no recovery can be had on coupons which matured during this period, but were not paid until after the act of 1864 was enacted. But the tax on such coupons as became payable between the 30th of June, 1862, and the 1st of July, 1864, and were not paid until after the latter date, became due under the act of 1864, if the coupons were paid prior to the passage of the act of 1866, ch. 184, and under the latter act if paid after its passage."

Fourth instruction asked and refused: "So too under the act of 1864, on the coupons which matured between June 30, 1864, the date of passage of that act, and the 13th of July, 1866, the date of the passage of the act of 1866, ch. 184, amendatory of the act of 1864, but which were not actually paid until after the passage of the act of 1866, the tax did not become due under the act of 1864, but under the act of 1866; and as no tax has been sued for under the act of 1866, the jury cannot find against the defendant on any of the coupons that matured between the date of the passage of said act of 1864 and that of the act of 1866, unless they were actually paid prior to the passage of the act of 1866."

Fifth instruction asked by defendant and refused: "The first count in the declaration alleges that the defendant company, during the period of time from the first day of July, 1862, to the first day of December, 1865, owned and possessed, had the care, management and control of, and operated said railroad; and that said road having been engaged in the employment and business of transporting

passengers and property for hire and in transporting the United States mail, acquired thereby net earnings from July 1, 1862, to December 1, 1865, amounting to $300,623.83, which defendant company used during that time in paying the interest coupons on the bonds of said company and dividends declared, also in construction and improvement of its said road beyond and in addition to the condition of said railroad on said 1st of July, 1862, and thereby said defendant became subject to the payment of $11,735.82 as an internal revenue tax on said payments to the United States Government. These allegations are so framed as to confine the Government to the proof of taxes on coupons, dividends and net earnings actually paid within the alleged period from July 1, 1862, to December 1, 1865, and the tax from July 1, 1862, to June, 1864, is recoverable only under the act of June 30, 1862, ch. 119, sec. 81, fixing the tax at 3 cents, and the tax from June, 1864, to December 1, 1865, is only recoverable under the act of 1864, ch. 173, sec. 122, fixing it at 5 per cent."

Sixth instruction asked by defendant and refused by the court:

"So too, the second count alleges, that defendant company, from July 1st, 1862, to July 1st, 1863, had owned, possessed, had the care, management and control of said railroad, and employed the same for and during this time, in carrying passengers and freight for hire and the United States mails, and the net earnings of this employment for this time amounted to $73,820.83, which sum was used by defendant in paying interest coupons on the time bonds of defendant and dividends declared, and constructing improvements on said road beyond the condition of the same

on July 1st, 1862, and the defendant thereby became subject to pay, as internal revenue taxes, the sum of $2,214.62 by law assessed against defendant. These allegations are so framed as to confine the Government to proof of taxes on coupons, dividends, and net earnings actually paid out within the alleged period from July 1st, 1862, to July 1st, 1863, and that this tax is recoverable only under the act of June 30th, 1862, ch. 119, section 81, fixing the tax on the amount so paid out, and when paid."

Seventh instruction asked by defendant, and refused by the court:

"For the same reasons, the Government must prove the tax on $90,930.00 alleged at $2,727.70, as having been earned and paid out in the periods from July 1st, 1863, to June 30th, 1864, and under said act of 1862, ch. 119, section 81, fixing the tax at 3 per centum on the amount so paid out, and when paid."

Eighth instruction asked by defendant and refused by the court:

"For the same reasons, the Government must prove the tax on $90,580.00 alleged at $4,529.00, as having been earned and paid out in the period from June 30th, 1864, to June 30th, 1865, and under the act of 1864, ch. 173, sec. 122, fixing the tax at 5 per centum on the amount so paid out, and when paid."

Ninth instruction asked by defendant and refused by the court:

"For the same reasons, the Government must prove the tax on $45,290.00 alleged at $2,264.50, as having been earned and paid out under the act of 1864, ch. 173, section 122,

fixing the tax at 5 per centum on the amount so paid out, and when paid."

Eleventh instruction asked by defendant and refused by the court:

"The plea of accord and satisfaction filed and relied on in this case is fully proved, and entitles the defendant to a verdict against the whole claim sued for in this case."

Twelfth instruction asked by defendant and refused by the court:

"As to all the coupons which fell due prior to December, 1865, and which were not paid until after that date, the tax on them cannot be recovered in this case."

Thirteenth instruction asked by defendant and refused by the court:

"The proof shows that between December 1st, 1865, and the first day of May, 1866, the company paid on coupons, that fell due from July, 1862, to November, 1865, inclusive, the sum of $37,030.00; and inasmuch as the declaration is for tax on coupons paid prior to the 1st of December, 1865, the Government cannot, in any event, recover the tax on this sum of $37,030.00, under this declaration."

Fourteenth instruction asked by defendant and refused by the court:

"The tax on interest coupons is a tax upon such coupons. If the company was unable to pay more than 40 per cent. on each coupon, or only the full amount in depreciated currency, worth 40 cents taken at par, or any other value less than par, then the recovery can only be the tax on such value."

Fifteenth instruction asked by defendant and refused by the court:

"If the jury find from the evidence that the only dividend declared by the defendant was on March 17, 1863, and was expressly declared to be payable only in Confederate money, and that the earnings of the defendant, out of which it was declared, consisted altogether of said Confederate money, then no tax thereon can be recovered in this case."

Sixteenth instruction asked by defendant and refused by the court:

"The declaration only alleges that the taxes due and unpaid were and amounted to $11,735.82, and the Government cannot, on this declaration recover, in any event, more than that sum, together with interest, in the event the court should instruct the jury that interest is recoverable."

Seventeenth instruction asked by defendant and refused by the court:

"If the jury are satisfied from the testimony that, in fact, the coupons paid by defendant from January, 1866, to November, 1869, included coupons that matured from July, 1862, to January, 1866, as well as those maturing from January, 1866, to November, 1869, and constituted a part of the coupons on which the taxes were due when the settlement and compromise was made with Wicks, as President of said company, then the compromise embraced the taxes due on all such coupons, and they will find for the defendant."

Eighteenth assignment of errors:

The defendant duly objected, and accepted to the following instruction given by the court to the jury:

"It being a tax on the individuals holding the coupons and shares of stock levied on their incomes respectively, derived from this source, it would seem that the company could not claim exemption from its payment by reason of any supposed hardship growing out of the fact that its road-bed was in possession of the military authorities of the United States, on the one hand, and its rolling stock under the control of the military authorities of the Confederate States, on the other. The facts in proof show that, notwithstanding this unfortunate situation, the company made earnings, declared a dividend and paid interest on its bonds; and it is on these the acts of Congress levy the tax. It is wholly immaterial from what source the money to pay the interest is derived, whether by borrowing it, earning it, or how else, it is subject to this tax."

Nineteenth assignment of errors:

The defendant duly objected and excepted to the following instruction given by the court to the jury:

"So too, it is immaterial from what source the dividends are earned, whether by employment in the service of a hostile government, or in some other way, whenever the earnings are made, and the dividend declared, the tax attaches to it as the property of the persons to whom it is paid."

Twentieth assignment of errors:

The defendant duly objected and excepted to the following instruction given by the court to the jury:

"The claim of the defendant, that it is not liable in this suit by reason of the facts shown to exist, growing out of

the late war, is wholly untenable on another ground. Treating it as a direct tax on this corporation, there can be no doubt of the power of Congress to tax citizens of the Confederate States, whether they were adhering to the one side or to the other, and all the property of every kind belonging to them, and these revenue laws under consideration, operated throughout those States engaged in war against the United States, as well as the others; and the fact that the property taxed, or the citizen taxed, was engaged in war against the United States, cannot in any way change this result. Nor can the fact that the United States was temporarily prevented by a paramount insurrectionary military force, hostile to the Government, from enforcing these laws, operate to release the tax, or exempt the defendant from its liability. It would be anomalous to hold otherwise; and, as we understand it, the Supreme Court has finally decided that the cases relied on by the learned counsel for the defendant to establish a contrary doctrine, have no application to the war between the United States and the Confederate States."

Twenty-first assignment of errors:

The defendant duly objected and excepted to the following instruction given by the court to the jury:

"The defendant relies upon an accord and satisfaction, and proves a compromise with the Treasury officials, which it insists, precludes any demand for this tax. I think, after a careful consideration of all the facts and the correspondence relied on to show this satisfaction, that the taxes sued for in this suit were not in contemplation of the parties at the time, and are not at all affected by the agreement then reached. But even if it could be said that the defen-

dant had in view the settlement of the taxes now sued for, it is plain that the Secretary of the Treasury and the Internal Revenue Commissioner have limited the compromise to the taxes on interest of bonds falling due after May 1st, 1866, and up to July, 1869."

Twenty-second assignment of errors:

The defendant duly objected and excepted to the following instruction given by the court to the jury:

"It is in proof that some of the coupons were not paid in cash, but were funded in second mortgage bonds. It appears that the creditor had his option to take payment in cash, or take these new bonds at a certain agreed discount. It was therefore substantially a payment in cash, and a re-investment of the amount in the second mortgage bonds. This can constitute no defense to this suit."

Twenty-third assignment of errors:

The defendant duly objected and excepted to the following instruction given by the court to the jury:

"That all payments made by the defendant in Confederate money, either on dividends or interest, the defendant is only liable to the tax on the legal tender value of the Confederate money at the time the tax accrued."

BRIEF.

The first instruction should have been given, for the act of 1862, ch. 119, section 81, imposes the tax of three per cent. *on the interest coupons* and *on the dividends*, and "authorizes and requires the persons in charge of the railroad company *to deduct and withhold from all payments made to any person, persons or party, after the 1st day of July, 1862*, on account of any interest, or coupons or dividends due and payable as aforesaid, the said duty or sum of three per centum;" and said act makes this deduction a receipt and discharge for the amount so deducted, on the coupons or dividends; and it requires a return to be "made within thirty days after the maturity or becoming due of such coupons and dividends."

At the time of the passage of this act, July 1st, 1862, the persons in charge of the defendant company, all its officers and employes, with all its rolling stock and equipment, were within the military lines of the Confederate army, forcibly taken, and forcibly held there, until the 12th day of September, 1865. They were permitted to hire out the rolling stock, equipments and employes to other railroads within the Confederate lines, but were permitted to receive no compensation but Confederate treasury notes. During the three years they were thus held in the Confederate military lines, the company accumulated $88,935 of Confederate treasury notes and paid interest coupons on these bonds, which fell due during that period.

During this period, from June 6th, 1862, to Sept. 12, 1865, by a military power the persons in charge of this railroad, with all its rolling stock and equipments, were forcibly detained within the military lines of the Confederate armies.

It would have been physically impossible for these persons in charge of said company to know of the existence of these laws; it would have been in violation of the acts of Congress of the United States, and of the laws of war for the defendant company and those in charge of it, to have attempted to communicate with the government, or officers or people of the United States outside of the Confederate military lines. It would have been equally illegal for the persons in charge of the defendant company to have attempted to deduct the 3 percentum tax from the coupons as they were paid, or to have attempted to make the report, or to make the payment of the tax, or to have assessed the tax.

This country which the Confederate military authorities and forces held in possession from June, 1862, to September, 1865, the enemy held that firm possession of, which enabled this enemy to exercise the fullest rights of sovereignty over. And over this territory the sovereignty of the United States was of course suspended, and the laws of the United States could no longer be rightfully enforced there, or be obligatory upon the inhabitants who remained and submitted to the conquerors. By the military occupation the inhabitants passed under a temporary allegiance to the Confederate government, and were bound by such laws, and such only as it chose to recognize and impose. From the nature of the case no other laws could be obligatory upon them,

for where there is no protection, or allegiance, or sovereignty, there can be no claim to obedience.

United States v. Rice, 4 Wheaton R. 246.
Hurington v. Smith, 8 Wallace R. 1.
Hanauer v. Woodruff, 15 Wallace R. 445–6.
Fleming v. Page, 6 Howard R. 614.

The first and second instructions asked, on pages 38 and 39 of the record, involve the view above presented to the court.

The passage and existence of the law could not, from June, 1862, to Sept. 12, 1865, have been lawfully made known to the defendant company; all intercourse with them was forbidden and prohibited by the statutory law of the United States. Being within the lines and under the coerced control of the Confederate military authorities, they could not have reserved or deducted the tax from the payments of interest or dividends; such an attempt would not only have been futile but would have subjected them to both civil and criminal liability to the de facto government, or government of paramount force.

In Nelson v. Dean, 10 Wallace R. 172, this court, considering a suit against Nelson and May, instituted and prosecuted to judgment at Memphis after June 6th, 1862, and before the close of the war, and while Nelson and May were in the Confederate lines, the one voluntarily and the other by a military order, declared, at page 169: "that the decree, tested by the principles of universal justice, was a mere nullity. The law of nations, the act of Congress, nay, the direct command of this military power itself, forbade Nelson from appearing, even if accident had brought

the publication to his notice. The law cannot create a default when the law forbids a performance."—p. 169. And at p. 172, in the same case this court say: "The defendants in the proceedings were within the Confederate lines at the time, and it was unlawful for them to cross those lines. A notice directed to them and published in a newspaper was a mere idle form. They could not lawfully see or obey it. As to them, the proceedings were wholly void and inoperative."

10 Wallace R., p. 172.

Lasere v. Rochereau, 17 Wallace 437.

This reasoning and the principles here announced demonstrate the correctness of the first and second instructions asked by defendant.

When the acts of July, 1862, and July, 1864, imposing these taxes, were enacted and approved, the persons in control of the defendant company were in the Confederate lines, in the immediate custody and control of the Confederate Government and military authorities. Such was and continued to be their situation when the $88,935 of coupons were paid, and when the $143,789 of dividends were paid. They could not then lawfully know or obey these laws, and they cannot be liable for their violation. When these laws were *prescribed by the supreme power*, it was unlawful to communicate their existence to the defendants; when the coupons and dividends were paid, it was unlawful for defendants to know or to attempt to obey them. To enforce these laws against defendants as to coupons and dividends paid while they were in the lines and under the control of the Confederate Government and military authorities, would be clearly most unjust.

The act of 1862 requires the tax to be deducted when the coupon or dividend is paid. The act of 1864 makes the tax due when the coupon or dividend becomes payable. But both the acts of 1864 and of 1866 repeal the sections of the acts of 1862 and of 1864 imposing the tax. The language of the act of 1862, ch. 119, sec. 81, vol. 12, Stat. at Large, p. 469, is: "*Said coupons and dividend shall be subject "to, and pay a duty of three per centum on the amount of all "such interest, or coupons or dividend whenever the same shall "be paid.*"

The act of 1864, approved June 30, 1864, ch. 173, section 122, p. 284 of 13th vol. Stats. at Large, increases the tax to 5 per centum, and makes the tax due "*whenever the same "shall be payable.*"

The act of 1866, approved July 13, 1866, ch. 184, sec. 9, last clause of page 138, strikes out all after the enacting clause of sec. 122 above, and inserts the same provision anew.

We insist, therefore, that all coupons and dividends which fell due during the period of time from June 30, 1862, to July 13th, 1866, and were not paid until after January 1st, 1866, were due under the act of 1866, and as the declaration does not allege any tax as due under that act, these taxes could not be recovered in this suit. The record shows that of these taxes on coupons that fell due from 1862 to 1866, and were not paid until 1866, there were $32,800.

See record p. 33.

This point covers the assignments of error from the third instruction asked to the ninth instruction, inclusive, and the twelfth and thirteenth instructions.

The eleventh instruction asked the plea of accord and

satisfaction to be charged as fully proved and entitling defendant to a verdict.

The evidence was as follows: The Commissioner of Internal Revenue sought a report and return of taxes due the Government on coupons and dividends of the defendant company. M. J. Wicks, President of the company, made a report, shown at page 23 of the record, aggregating $438,550 of coupons, making the amount of taxes due $21,927.50. Maj. Wicks proposed, as a final settlement, to pay $24,000, "*if you will receipt us in full for all past due* "*taxes, fines, penalties, etc.*, due the United States, arising "out of our failure to report payment of coupons at the "proper time, provided said payment is to be a final settle- "ment of the whole matter in controversy."

See pages 23–24 of record.

This proposition was accepted and the money paid. The receipt of the Collector, at page 27 of the record, expressly refers to and accepts the compromise as proposed by Wicks, in these words: "*accepting the proposition in compromise* "*made to him by the Memphis and Charleston Railroad Com-* "*pany.*"

Again, in the letter of Commissioner Douglas, of Aug. 27, 1870, instructing the Collector, R. F. Patterson, at Memphis, to accept the proposition of compromise, he says: "*I have* decided, with the advice and consent of the "Hon. Secretary of the Treasury, *to accept the same as tax;* "please notify M. J. Wicks, President of the company, *of* "*this acceptance.*" See record p. 25, last par., and p. 26.

"The proof further tended to show that the coupons maturing prior to January 1st, 1866, formed a part of the aggregate amount reported due by Major Wicks."

Record page 28.

"Defendant also introduced evidence of the officers of "the company tending to prove that they understood the "settlement and compromise evidenced by the receipt of "R. F. Patterson of date Sept. 24th, 1870, to be a settle- "ment of all taxes, fines and penalties due the United "States from the defendant." Record page 27.

The case on the compromise therefore showed a demand by the Government of all taxes due on account of coupons and dividends, a report by Wicks as President of the company giving all he knew of as due; and although his report apparently only covered coupons from January, 1866, yet in fact it included and embraced the coupons that fell due and were paid before 1866, that is, the very coupons on which the tax is claimed as now due under this suit. Wicks proposed to pay the $24,000 if accepted and receipted "for in full for all past due taxes, fines and pen- "alties, &c., due the United States, arising out of the fail- "ure to report payment of coupons." This proposal was accepted, and the money received as tax in full.

We respectfully submit the plea of accord and satisfaction is made out, and should have been sustained by the court. This point is embraced in the 11th instruction, pp. 41–2, and seventeenth instruction, p. 43, asked by defendant and refused by the court.

The fourth paragraph of the twelfth instruction requested by the defendant and refused by the court, is in these words: "Fourth. Whatever coupons fell due from July 1, 1862, to December 1, 1866, and which the proof shows were funded into second mortgage bonds, were not so paid as to make them liable to the tax sued for in this case."

Record p. 42.

On this point the court gave a special instruction in these words: "It is in proof that some of the coupons were not paid in cash, but were funded in second mortgage bonds. It appears that the creditor had his option to take payments in cash, or take these new bonds at a certain agreed discount. It was therefore substantially a payment in cash and a reinvestment of the amount in second mortgage bonds. This can constitute no defense to this suit." Record p. 44, last par., and p. 45.

Exception was taken to the refusal to give the instruction as asked and to the giving of that just quoted.

Under the act of 1862, ch. 119, sec. 81, the tax did not become due unless the coupons were paid, and that out of the earnings or net profits, that is, in cash. 12 Stat. at Large, p. 469–70. The act of 1866, ch. 184, sec. 9, p. 139, contains a proviso "that when the companies are unable, "and do not pay the interest, the tax shall not be paid." This exchange of the interest coupons for second mortgage bonds of the same debtor was not a payment, but a novation, a renewal and extension of indulgence.

"Payment is the discharge, in money, of a sum due the "fulfillment of a promise." 2 Bouvier's Dic., p. 311. "Novation is the substitution of a new obligation for the old one." 2 Bouvier's Dic., p. 241. The express provisions of these statutes refer to a payment in money of the interest, and not a renewal and extension of the time of payment.

Over $100,000 of these coupons that fell due from July, 1862, to July, 1866, were funded into second mortgage bonds. See last paragraph of p. 27 of record.

The instructions given by the court are each in direct opposition to those requested by the defendant, were each excepted to by defendant, and have already been discussed in discussing the instructions requested by defendant.

POSTON & POSTON,
W. Y. C. & L. W. HUMES,
Attorneys for Defendant.

108-228

108-228

OFFICE SUPREME COURT U.S.
FILED
MAR 6 1883
JAMES H. MCKENNEY, CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1882.

MEMPHIS AND CHARLESTON RAILROAD COMPANY, plaintiffs in error,
vs.
THE UNITED STATES, DEFENDANTS in error.
} No. 179.

BRIEF FOR THE UNITED STATES.



In the Supreme Court of the United States.

OCTOBER TERM, 1882.

MEMPHIS AND CHARLESTON RAILROAD COMPANY, plaintiff in error,
vs.
THE UNITED STATES, DEFENDANTS in error.
No. 179.

BRIEF FOR THE UNITED STATES.

The facts upon the record, and the twenty-three assignments of error upon behalf of the railroad company, appear upon the first twelve pages of the brief of the learned counsel.

The statutes in question may be found in an appendix to this brief.

Assignments of error, numbered 1 *and* 2, involve a question whether the United States could impose a tax upon coupons paid and dividends declared by a railroad company during the pendency of the late rebellion, in a case

where moreover the property of such company was then partly in the possession of the rebel government and partly in that of the United States.

It seems that if Congress has actually imposed such a tax the courts will enforce the provision.

The United States had both sovereign and belligerent rights against all who resided within the rebel lines. (Miller's case, 11 Wall., 307; Lamar *vs.* Browne, 92 U. S., 195.) It was for Congress to say how far property and transactions within those lines should contribute to the public revenues and the expense attending a restoration of peace throughout the whole country. Congress has thought fit not to except this company from the operation of the general presumption that all persons within the Confederate lines were in active sympathy with the rebellion, so that if their property was seized by the government of force set up by themselves, this occurred virtually *at their own instance*, and so is not to be reckoned as a hardship. This presumption therefore will be enforced by the courts.

As for any ground of reclamation by the company against the United States, on account of their possession and use of a part of its road—that is a matter for Congress. The courts at all events have no general jurisdiction of such a *set-off* or *recoupment;* and no special jurisdiction thereof has been conferred upon them. Railroad Co. v. The United States, 101 U. S., 93. (See, also, Pacific Railroad case, 4 Dillon, 66; which, excepting the absence *here* of a plea of set-off, is much like the present case.)

The Castine case, (14 Wheat., 246), and Tampico case, (9 How., 614), cited upon the other side (page 15), show no more than that foreign articles cannot be imported into the United States excepting under their customs' machinery, so that where such machinery was not in operation, either on account of temporary forcible suspension, as at Castine during the British occupation in 1814, or because it had never been applied by statute, as at Tampico whilst held by the armies of the United States in 1847, *importations* could not be made, and therefore all articles then brought into those ports remained *foreign*.

In Dean's case (10 Wallace, 172), also cited for the company, the question was whether in case the political department of the government for reasons of state had commanded non-intercourse with persons within the rebel lines, judicial process could issue ordering the attendance of such persons upon a court held in a loyal district. Unless courts have jurisdiction to modify competent military orders made by the executive, the answer to this question must necessarily be in the negative.

The question upon the present record is virtually, whether courts can set aside legislation affecting persons in rebellion, for any objection thereto other than such as are *constitutional*.

It seems, therefore, that the principle in the cases of Dean, and Lasere (17 Wall., 437), favors the present contention *of the government*, and not that of the company in aid of which these are cited.

Again, that the company was in a situation in which *as-*

assessment and *payment*, &c., were temporarily suspended by the pressure of the war, did not prevent a creation of the *relation of tax debtor*, or its continuance until such time as some competent means of enforcing it should arise.

The extraordinary machinery for collecting taxes is not *of their essence*.

Assignments of error numbered 3 to 9, inclusive, are said (Brief, p. 17) to involve the same principle.

That principle is stated by the learned counsel for the company as follows, [after a suggestion that the revenue act of 1864 *repealed* that of 1862, and the revenue act of 1866 in turn that of 1864]:

> We insist, therefore, that all coupons and dividends which fell due during the period of time from June 30, 1862, to July 13, 1866, and were not paid until after January 1, 1866, were due under the act of 1866, and as the declaration does not allege any tax as due under that act, these taxes could not be recovered in this suit. The record shows that of these taxes on coupons that fell due from 1862 to 1866, and were not paid until 1866, there were $32,800. (See record, p. 33.)

The necessity for suing under the act of 1866 is said to be "because the acts of 1864 and 1866 *repeal* the sections of 1862 and 1864 imposing the tax."

But this is a mistake.

The act of 1864 (13 Stat., 304, top) enacts "*that all the provisions of said acts* [one being that of 1862] *shall be in force for levying and collecting all taxes, duties, and licenses properly assessed or liable to be assessed or accruing under the provisions of former acts*," &c.

Nor does the act of 1866 *repeal* that of 1864. Its provisions in that connection (see Appendix) are only by way of *amendment*. The act of 1864, therefore, is altered only as regards such objects as are provided for by the act of 1866. Actual impositions of tax therefore by the former, *i. e.*, its creations of the relation of tax debtor anterior to the time of operation of the act of 1866, are not affected by the latter statute. As to these, the act of 1866 does not amend that of 1864. Supposing, however, that it do, then there is nothing in the *declaration* in this case to show that suit was not brought under the latter statute. That it was not so brought is, as I suppose, only *an inference* by the learned counsel, from the circumstance that the declaration includes no transactions but such as were completed before the enactment of that act. But by the present hypothesis such circumstance is not material for this purpose, it being supposed for argument's sake that the act of 1866 *amends* that of 1864 as to such transactions.

Whether, therefore, the act of 1866 does or does not amend that of 1864 as regards these transactions, the *assignments* in question are not well founded.

In this latter connection I hope to be understood as speaking of the operation of the act of 1866 *upon that of* 1864 *only*. For as regards taxes accruing under the act of 1862, the provision quoted above shows that the succeeding acts are without effect.

Except for what appears upon the brief for the company at page 17, I might have supposed that some of the instructions now under consideration (see Nos. 5 to 9, inclusive) were intended for another purpose, viz, to require the government *under the special allegations of the declaration* to prove that the various payments of dividends and of coupons occurred at the respective times therein mentioned, viz, at various dates anterior to the year 1866.

But these allegations of time are merely formal and are made uniformly under a "*to wit.*" (See amended declaration, record folios 11, 13, &c.)

As regards assignments 11 *and* 17, which relate to the plea of accord and satisfaction:

It is submitted that there is an inadvertency in the brief for the company as regards the terms of the receipt which is relied upon as establishing this plea.

The case herein is (see pp. 18, &c., of the company's brief) that after some investigation had been made by the Commissioner of Internal Revenue into the question whether the company was indebted for taxes, &c., its president made a proposal (April 25, 1870) to pay $24,000 "*if you will receipt us in full for all past-due taxes, fines, and penalties:*" (Record, folio 69.) That thereupon the Commissioner replied (August 27, 1870) that he had considered the proposition "*for a compromise of the claims of the United States against said company by reason of its failure to make returns of interest on its bonds maturing from May, 1866, to July, 1869, &c., and I have decided to accept the*

same as tax, the defendants to pay any costs legally accrued" (folio 75), and that accordingly the collector gave a receipt to the president for a sum as balance of amount—

"For penalty of neglect to make returns of interest on its bonds maturing from May, 1866, to July, 1869, agreeably to instructions from Commissioner, under date of August 27, 1870, accepting proposition in compromise made to him by Memphis and Charleston Railroad Company." (Folio 79.)

This does *not* show (as is contended for the company) that the collector gave a receipt *accepting the proposition of the company*, but that such receipt was given agreeably to certain instructions from the Commissioner, *which the collector designates* as being of a certain date, and also as "accepting proposition," &c. This receipt is, of course, no broader than the instructions so designated, and therefore the extent to which it accepts the proposition must be ascertained by referring to the instructions. Such reference shows *expressly and precisely* that the Commissioner was thinking of taxes upon transactions later than those now in question. These precise expressions are not to be explained away by any less definite language in the context; but vice versa in case of difficulty *must explain it*, and so be held to be a notice to the company that the *acceptance* extended no farther than as by them limited; as indeed in all propriety of action by a government official, they should not have done.

The pending contention by the government at that time was as to taxes accruing *after* 1866, and as to these certain penalties, &c., were demanded. Thereupon the company proposed a certain payment *in full of all demands*, which the Commissioner, apparently thinking that these taxes were all that were due, *accepted* (?) directing his dis-

charge however only to these, and wording his receipt accordingly.

Thereupon it is claimed that such receipt is to be read as including other taxes not then under discussion.

Upon the contrary I submit that if the instructions and receipt had been worded as desired by the company it may be that relief could have been had by the government against such inadvertent language when sought to be applied to a subject-matter not then under contemplation. But surely in a case, where a release does not violate the intentions of the party who gave it, there is no equity for *extending it*—under the circumstances of *bona fides* apparent here: "circumstances" of plain inadvertence upon the part of a government officer as to the possible operation of the release proposed, coupled with definite notice to the other party of the existence of such inadvertence by, amongst other things, an omission to word the release in the manner proposed.

The twelfth instruction asked by the company was that, "As to all the coupons which fell due prior to December, 1865, and which were not paid until after that date, the tax on them cannot be recovered in this case." This was grounded upon *four* reasons, the fourth of which is that "whatever coupons fell due from July 1, 1862, to December 1, 1865, and which the proof shows were founded on second-mortgage bonds, were not so paid as to make them liable to the tax sued for in this case." (Folios 118–'9.)

This is referred to upon pp. 10 and 11 of the company's brief.

Inasmuch as these mortgage bonds were taken at the *option* of the coupon holders, who were offered an alternative of *cash*, it seems that the contention upon this point, even if *material*, is without foundation.

The instructions given by the learned Judge below upon this point as well as upon several others here before the court, which are to be seen upon folios 123, &c., of the record, appear to be as well founded as they are clear and exact.

As nothing is said upon the brief of the learned counsel as to the other assignments of error it is taken for granted that they are abandoned.

S. F. PHILLIPS,
Solicitor-General.

APPENDIX.

[Act of 1862, ch. 119, sec. 81; 12 Stat., p. 469.]

That on and after the first day of July, eighteen hundred and sixty-two, any person or persons owning or possessing, or having the care or management of any railroad company or railroad corporation, being indebted for any sum or sums of money for which bonds or other evidences of indebtedness have been issued, payable in one or more years after date, upon which interest is, or shall be, stipulated to be paid, or coupons representing the interest shall be or shall have been issued to be paid, and all dividends in scrip or money or sums of money thereafter declared due or payable to stockholders of any railroad company, as part of the earnings, profits, or gains of said companies, shall be subject to and pay a duty of three per centum on the amount of all such interest or coupons or dividends whenever the same shall be paid; and said railroad companies or railroad corporations, or any person or persons owning, possessing, or having the care or management of any railroad company or railroad corporation, are hereby authorized and required to deduct and withhold from all payments made to any person, persons, or party, after the first day of July, as aforesaid, on account of any interest or coupons or dividends due and payable as aforesaid, the said duty or sum of three per centum; and the duties deducted as aforesaid, and certified by the president or other proper officer of said company or corporation, shall be a receipt and discharge, according to the amount thereof, of said railroad companies or railroad corporations, and the owners, possessors, and agents thereof, on dividends and on bonds or other evidences of their indebtedness, upon which interest or coupons are payable, holden by any person or party whatsoever, and a list or return shall be made and rendered within thirty days after the time fixed when said interest or coupons or dividends become due or payable, and as often as every six months, to the Commissioner of Internal Revenue, which shall contain a true and faithful account of the duties received and chargeable, as

aforesaid, during the time when such duties have accrued or should accrue, and remaining unaccounted for; and there shall be annexed to every such list or return a declaration under oath or affirmation, in manner and form as may be prescribed by the Commissioner of Internal Revenue, of the president, treasurer, or some proper officer of said railroad company or railroad corporation, that the same contains a true and faithful account of the duties so withheld and received during the time when such duties have accrued or should accrue, and not accounted for, and for any default in the making or rendering of such list or return, with the declaration annexed, as aforesaid, the person or persons owning, possessing, or having the care or management of such railroad company or railroad corporation, making such default, shall forfeit, as a penalty, the sum of five hundred dollars; and in case of any default in making or rendering said list, or of any default in the payment of the duty, or any part thereof, accruing or which should accrue, the assessment and collection shall be made according to the general provisions of this act.

By section 14 of the act of 1864, ch. 173 (13 Stat., 226), which is elaborate, provision is made for cases in which parties owing taxes have been guilty of *fraud*, *refusal*, or *neglect* in making returns. In such cases *assessors* are to inform themselves, and thereupon to enter proper charges upon their tax lists, "*and* (p. 227) *in case of a refusal or neglect, except in cases of sickness or absence, to make a list or return or to verify the same as aforesaid, he shall add fifty per centum to such duty*," &c.

[Act of 1864, ch. 173, sec. 122; 613 Stat., p. 284.]

That any railroad, canal, turnpike, canal navigation, or slack-water company indebted for any money for which bonds or other evidence of indebtedness have been issued, payable in one or more years after date, upon which interest is stipulated to be paid, or coupons representing the interest, or any such company that may have declared any dividend in scrip, or money due or payable to its stockholders, as part of the earnings, profits, income, or gains of such company, and all profits of such company carried to the account of any fund, or used for construction, shall be subject to and pay a duty of five per centum on the amount of all such interest,

or coupons, dividends, or profits, whenever the same shall be payable; and said companies are hereby authorized to deduct and withhold from all payments, on account of any interest, or coupons and dividends due and payable as aforesaid, the duty of five per centum; and the payment of the amount of said duty so deducted from the interest, or coupons, or dividends, and certified by the president or treasurer of said company, shall discharge said company from that amount of the dividend, or interest, or coupon, on the bonds or other evidences of their indebtedness so held by any person or party whatever, except where said companies may have contracted otherwise. And a list or return shall be made and rendered to the assessor or assistant assessor in duplicate, and one of said lists or returns shall be transmitted and the duty paid to the Commissioner of Internal Revenue within thirty days after the time when said interest, coupons, or dividends become due and payable, and as often as every six months; and said list or return shall contain a true and faithful account of the amount of the duty, and there shall be annexed thereto a declaration of the president or treasurer of the company, under oath or affirmation, in form and manner as may be prescribed by the Commissioner of Internal Revenue, that the same contains a true and faithful account of said duty. And for any default in making or rendering such list or return, with the declaration annexed, or of the payment of the duty as aforesaid, the company making such default shall forfeit as a penalty the sum of one thousand dollars; and in case of any default in making or rendering said list or return, or of the payment of the duty, or any part thereof, as aforesaid, the assessment and collection of the duty and penalty shall be made according to the provisions of law in other cases of neglect or refusal.

By the act of 1866, ch. 184, sec. 9 (14 Stat., p. 104, paragraph 1), it is provided in cases where annual and other lists are incomplete by the omission of names of parties owing tax, *or in consequence of any omission or understatement, or undervaluation or false or fraudulent statement contained in any return or returns made by any person or persons liable to tax*, that "the said assessor may from time to time, or at any time within fifteen months from the time of the passage of this act, or from the time of the delivery of the list to the collector as aforesaid, enter on any monthly or special list the names of such persons or parties so omitted, together with the amount of tax for which they have been, or

may become, liable, and also the names of the persons or parties in respect to whose returns, as aforesaid, there has been or shall be any omission, undervaluation, understatement, or false or fraudulent statement, together with the amounts for which such persons or parties may be liable, over and above the amount for which they may have been, or shall be, assessed upon any return or returns made as aforesaid, and shall certify or return said list to the collector as required by law."

[Act of 1866, ch. 184, sec. 9; 14 Stat., p. 138 (bottom).]

That section one hundred and twenty-two be amended by striking out all after the enacting clause and inserting in lieu thereof the following: That any railroad, canal, turnpike, canal navigation, or slack-water company, indebted for any money for which bonds or other evidence of indebtedness have been issued, payable in one or more years after date, upon which interest is stipulated to be paid, or coupons representing the interest, or any such company that may have declared any dividend in scrip or money due or payable to its stockholders, including non-residents, whether citizens or aliens, as part of the earnings, profits, income, or gains of such company, and all profits of such company carried to the account of any fund, or used for construction, shall be subject to and pay a tax of five per centum on the amount of all such interest, or coupons, dividends, or profits, whenever and wherever the same shall be payable, and to whatsoever party or person the same may be payable, including non-residents, whether citizens or aliens; and said companies are hereby authorized to deduct and withhold from all payments on account of any interest, or coupons, and dividends, due and payable as aforesaid, the tax of five per centum; and the payment of the amount of said tax so deducted from the interest, or coupons, or dividends, and certified by the president or treasurer of said company, shall discharge said company from that amount of the dividend, or interest, or coupon on the bonds or other evidences of their indebtedness so held by any person or party whatever, except where said companies may have contracted otherwise. And a list or return shall be made and rendered to the assessor or assistant assessor on or before the tenth day of the month following that in which said interest, coupons, or dividends become due and payable, and as often as every six months; and said list or return shall contain a true and faith-

ful account of the amount of tax, and there shall be annexed thereto a declaration of the president or treasurer of the company, under oath or affirmation in form and manner as may be prescribed by the Commissioner of Internal Revenue, that the same contains a true and faithful account of said tax. And for any default in making or rendering such list or return, with the declaration annexed, or of the payment of the tax as aforesaid, the company making such default shall forfeit as a penalty the sum of one thousand dollars; and in case of any default in making or rendering said list or return, or of the payment of the tax or any part thereof, as aforesaid, the assessment and collection of the tax and penalty shall be made according to the provisions of law in other cases of neglect or refusal.

* * * * *

That section one hundred and twenty-two be further amended by adding thereto the following proviso: *Provided*, That whenever any of the companies mentioned in this section shall be unable to pay the interest on their indebtedness, and shall in fact fail to pay such interest, *that* in such cases the tax levied by this section shall not be paid to the United States until said company resume the payment of interest on their indebtedness.

108-228

108-228

OFFICE SUPREME COURT U. S.
FILED
DEC 12 1882
JAMES H. McKENNEY, Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1882.

THE MEMPHIS, &C., COMPANY, PLAINTIFF IN ERROR, *vs.* THE UNITED STATES. } No. 179.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1882.

THE MEMPHIS, &C., COMPANY, plaintiff in error. *vs.* THE UNITED STATES. } No. 179.

BRIEF FOR THE UNITED STATES.

This action was brought to recover from the company a tax upon sums paid by it for dividends on stock, and for interest coupons upon bonds which had matured from the 1st of January, 1862, to the 1st of December, 1865.

The jury found (folio 53) that on the 17th of March, 1863, the company declared a dividend of $143,789, paid in Confederate money (of the value of $57,515.60, legal currency), and also that it paid $88,935 in Confederate currency (of the value of $27,326.55, legal currency), and $75,815.83, in legal currency, for interest coupons falling due from November 1, 1862, to May 1, 1864.

It further found that the company was liable for 3 per cent. tax upon the above legal-currency values and payment, and also that it was liable for 5 per cent. tax on $135,870 for interest coupons due November 1, 1864, May 1, 1865, and November 1, 1865.

Upon the judgment entered accordingly the company sued out this writ of error.

Seven of the requests for instructions presented by the company (numbered 3, 4, 5, 6, 7, 8, 9, pp. 39 *et seq.*), turn upon the circumstance that the acts of 1864 and 1866 were passed in the interval between the maturity and payment of some portions of the interest.

By section 81 of the act of July 1, 1862 (12 Stat., 469), the company became subject to a duty of 3 per cent. upon interest or dividends "whenever the same shall be paid"; by the act of June 30, 1864 (13 Stat., 284), to a duty of 5 per centum on interest or dividends "whenever the same shall be payable"; and by the act of July 13, 1866 (14 Stat., 139), to a duty of 5 per centum upon interest or dividends "whenever the same shall be payable", with a proviso that if the company should be unable and should in fact fail to pay the interest the tax should not be due until resumption of such payment.

The third instruction upon page 38 is in exact accord with these statutes, and to it the company made no objection. As the act of 1864 increased the tax from 3 per centum to 5, the company has received no injury from the refusal of the judge to charge that interest *maturing* prior to but not *paid* until after the 30th June, 1864, should be assessed under the act of that date. No inability or actual failure of the company to pay its interest at maturity has been alleged, and for all the purposes of this case the acts of 1864 and 1866 agree in fixing the time of the *maturity* of the interest as that when the tax became payable. The act of 1862 fixed the time of *payment* of interest as that when the tax became

due, but under this statute, as well as the other two, so long as payment preceded the institution of the suit, time was of no consequence. The allegation therefore in the first count of the declaration that "*during said time*" (*i. e.*, between the 1st July, 1862, and the 1st December, 1865) the money was paid out for dividends and scrip (p. 2) is surplusage.

This observation disposes also of the defendant's 13th request (p. 42).

THE FUNDING IN SECOND MORTGAGE BONDS.

To the instruction granting the second request of the plaintiff below (p. 37, bottom) the defendant objected, whilst the defendant's twelfth request on the same subject was refused (p. 42).

This funding of coupons in second mortgage bonds appears to have been done after January 1, 1866 (foot of p. 27).

By the act of 1864 the tax became due whenever the interest was payable. Installments of interest which had *matured* prior to June 30, 1864, although under the act of 1862 taxable only when "paid," became the subject of tax *eo instanti* on the passage of the act of 1864, being then "payable"; so far, therefore, as this funding was of interest which matured prior to June 13, 1866, it makes no difference whether the interest was or was not *paid*. Its payment in second mortgage bonds was therefore immaterial. After that date, in order to relieve the company from the tax, proof was required not merely of actual failure to pay such interest, but also of *inability* to pay. Under the second instruction for plaintiff (pp. 37, 38) the jury found that it was optional with the

holder of the coupons to receive cash or to accept second mortgage bonds at a discount. Apart, therefore, from the view of the court below, that the exercise of such preference was a virtual receipt of cash and a reinvestment, the ability of the company to pay in cash was proved to the satisfaction of the jury.

PAYMENTS IN CONFEDERATE MONEY.

By the exception to the plaintiff's third request (p. 38), and to the fifteenth instruction of the court (p. 45) and by its second request, the defendant sought to escape liability, on the ground that some of the interest coupons and all of the dividends were paid in Confederate money. The force to be given to transactions based upon such currency has been frequently considered by this court. The following cases seem to be decisive of this exception. (Thorington *v.* Smith, 8 Wall., 1; The Confederate Note case, 19 Wall., 548; United States *v.* Villalonga, 23 Wall., 35; Wilmington and Weldon R. R. Co. *v.* King, 91 U. S., 3; Stewart *v.* Salamon, 94 U. S., 434.)

It appears that the Confederate notes so paid out were not received by the company as compensation for services rendered in aid of the rebellion, but were collected from other railroad companies for hire of rolling stock (testimony of Tate, p. 35; first request of defendant, p. 39).

The fact that the United States controlled and used without compensation certain property of the company during a portion of the period covered by this demand for taxes is irrelevant. To have been made relevant to

the present action, there must have been a corresponding plea of set-off or counter-claim.

Had such plea been filed, the case would be identical with that of the Pacific Railroad (4 Dillon, 66) where the court sustained exceptions by the plaintiffs to the defendant's answer setting-off against a demand for taxes a claim for the use during war of the railroad and its appurtenances.

Another exception is based upon the circumstance that these funds were derived by the company from hire of their rolling-stock,—not from use of their road-bed. In Improvement Company *v.* Slack, 100 U. S., 648, it was held to be of no consequence *whence* the company obtained the money, so long as there was no actual failure to make payment.

THE COMPROMISE.

Upon the 24th September, 1870, the company paid to the collector $12,000, and took the following receipt: "Received of M. T. Wicks, president Memphis and Charleston Railroad Company, $12,000, being balance due on $24,038.25 for penalty of neglect to make returns of interest on its bonds maturing from May, 1866, to July, 1869, agreeably to instructions from Commissioner under date of August 27, 1870, accepting proposition in compromise made to him by Memphis and Charleston Railroad Company" (p. 27).

The *instructions* thus referred to described the *proposition* as being one for a compromise of the claim for taxes on interest "maturing from May, 1866, to July, 1869" (p. 25, bottom).

The court below, after exception by the United States,

admitted testimony as to how the officers of the company *understood* such compromise.

This testimony presents nothing but opinions as to the meaning of certain papers which led to and constituted the contract of compromise.

But the instructions by the Commissioner to the collector are unambiguous; and the receipt explicitly applies to bonds maturing between May 1866, and July, 1869. Even if the receipt failed to express the intent of both parties, so far as it is a contract it was not to be reformed for mistake in this *common law* proceeding. (Hurt *v.* Hollingsworth, 100 U. S., 100; Thompson *v.* Railroad Companies, 6 Wall., 134.)

As the parol evidence would not have warranted a verdict for the company, the court was not bound to submit it to the jury (Commissioners *v.* Clark, 94 U. S., 278), and it was not error to explain to the jury the correspondence and compromise.

Was such explanation erroneous?

The correspondence commences with an admission by the company (Record, pp. 21, 22) that it had credited the United States with taxes on coupons maturing May, 1866, to July, 1869, fixing the same at $21,475.30. Thereupon the company was assessed in the sum of $8,025.50 for taxes accruing within fifteen months (14 Stat., 104), and, under section 14, act July 30, 1864 (13 Stat., 227), a penalty of 50 per cent. was added for neglect to make returns, making a total of $12,038.25, and the company was also informed that it was liable to a penalty of $7,000, under section 122 (13 Stat., 284).

This penalty was not for the failures for which the 50

per cent. was added, but for those admitted by the company, and prior to the fifteen months to which the assessor limited the assessment.

Next follows the offer by the company to pay $12,000 for 12 penalties, which is the whole number of failures admitted by the company in its letters of November 14 and November 19, 1869, "providing said payment is to be a final settlement of the whole matter in controversy."

The record does not show that up to this time any tax falling due prior to the admissions of the company had been under discussion or in controversy, and the fair interpretation of this offer is that the $12,000 was intended as a final settlement only for the period under consideration. This was what the Commissioner of Internal Revenue understood it to be, for in submitting the offer to the Secretary of the Treasury he recommends the acceptance of the $12,000, not in the terms of the offer as twelve distinct penalties of $1,000 each, but, as an amount to be added to the $8,025.50, which had been assessed on the 15th January, 1870, making a total of tax of $20,025.50, a sum a little less than the amount admitted by the company to be due for taxes from May, 1866, to July, 1869. It is true that the correspondence between the Commissioner and Secretary was probably not submitted to the company prior to payment of the $12,000, but it is strong evidence of the intention of these officers, and shows that they did not understand the offer as involving taxes anterior to May, 1866.

It is evident however from the offer of April 25, 1870 (pp. 23, 24), the instructions of August 27, 1870 (pp. 25, 26), and the receipt of September 24, 1870 (p. 27), that whatever may have been the purpose of the company,

the United States by their acceptance of the $12,000 waived no rights not embraced within the language of the receipt.

S. F. PHILLIPS,
Solicitor-General.

JOHN S. BLAIR.

108-237

SUPREME COURT OF THE UNITED STATES.

No. 10 orgl.

EX PARTE EMERY E. NORTON.

City Item Print, 39 Natchez street.

SUPREME COURT OF THE UNITED STATES.

No. —.

EX PARTE EMERY E. NORTON.

To the Honorable the Judges of the Supreme Court of the United States of America:

The petition of Emery E. Norton, a citizen of the State of Louisiana, respectfully represents: That he is the duly appointed and qualified assignee in bankruptcy of Govy Hood who was upon his own petition adjudged a bankrupt by the District Court of the United States for the District of Louisiana, to wit: the 26th day of January, 1869; that heretofore, to wit: upon the 10th day of July, 1879, in his said capacity your petitioner exhibited and filed his certain bill of complaint in said court upon the equity side thereof, against the said Govy Hood, Henry Frellsen and John Asberry, wherein and whereby he complained and alleged that said Govy Hood had theretofore been adjudged and decreed to be a bankrupt, as aforesaid, under the provisions of the Act of Congress entitled, "An Act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867; that complainant had been duly appointed and qualified as assignee of the estate of said bankrupt; that his estate had been duly assigned to him, under the provisions of said act; that he was still such assignee, and that said Hood had received his discharge in bankruptcy.

And he further complained and alleged that in January, 1866, the said Hood was the owner of certain plantations and real estate, fully described in his said bill, which were of great value, to wit: of the value of one hundred thousand dollars; that he was nevertheless insolvent, and in April, 1866, confessed judgment in favor of the defendant, Henry Frellsen, his confidential friend and factor, for the sum of $39,319 49; that said Hood's insolvency was well known to said Frellsen during the whole of the years 1866, 1867 and 1868, and that said Frellsen advised said Hood to go into bankruptcy and relieve himself of his debts; that said Frellsen pretended to execute his said judgment in the summer and fall of 1868 by the pretended seizure and sale of the real estate of said Hood, described in petitioner's said bill of complaint, and became the purchaser thereof at such sale for about one-fourth of its value; that

in May, 1871, after the discharge in bankruptcy of said Hood said Frellsen reconveyed to him all of said property, excepting Black Bayou plantation, previously sold by him, with Hood's concurrence, to one William Alling.

And petitioner further complained and alleged in and by his said bill, that said sales, transfers and proceedings (excepting the sale to Alling), were fraudulent simulations made and executed by the said Hood and Frellsen, for the two-fold purpose of giving an unlawful preference to Frellsen, for the amount of his debt, and to defraud Hood's other creditors by placing his property beyond their reach, and that, to that end, it was agreed by and between them, that said Frellsen should nominally execute his said confessed judgment, nominally buy in all the property of Hood, hold the same in his name until Hood should obtain his discharge in bankruptcy and then reconvey the same to him; that Hood should remain in possession and control of the same, be entitled to all the rents and revenues thereof, as well as the proceeds of the sale of any part thereof, and be liable for all taxes, costs and expenses thereon accruing; and petitioner alleged that notwithstanding said pretended sale said Hood had never been dispossessed of, but had continuously remained in possession of said property (excepting that sold as aforesaid to Alling) before and during the pendency of his proceedings in bankruptcy to his discharge and thereafter up to the filing of said bill when he was still in possession; that he had paid the taxes thereon, and was at all times treated by said Frellsen as the owner thereof, who accounted to him as such for the proceeds of the sale of Black Bayou plantation, and certain revenues which came to his hands, and credited same upon his said judgment, during the pendency of said bankruptcy proceedings and prior to his discharge, and was then provoking a sale of said property by defendant Asberry, sheriff of Carroll Parish, State of Louisiana, under executory process against Hood foreclosing a mortgage granted him by Hood for the balance of his debt, at the time of his reconveyance to him as aforesaid.

And petitioner in and by his said bill also complained and alleged, that the aforesaid fraudulent agreement between Frellsen and Hood and simulated transfer were not known to him until a few weeks before he filed his said bill; but were carefully concealed by the parties thereto and were known only by their attorneys, until December, 1878, when the same were disclosed by their testimony in a lawsuit between them, and by the production of a counter letter given by Frellsen to Hood, dated October 26th, 1868; and that no diligence on his part would have enabled him to discover the facts prior to such disclosures.

And petitioner averred that at the time said Hood filed his petition as well as when he was adjudged bankrupt as aforesaid, all of said property belonged to him, and that the same passed to and was vested in complainant in his capacity of assignee of said Hood, by virtue of said assignment of his estate to him as aforesaid.

And your petitioner, in and by his said bill, prayed that he be decreed to be the owner, in his capacity as assignee of said bank-

rupt, of all the property described in his said bill, from the 29th day of December, 1868, (when said Hood filed his petition to be decreed bankrupt), and entitled to recover the rent and revenues thereof from the said Hood and Frellsen; that said Hood be ordered to retransfer to complainant the property reconveyed to him by said Frellsen, as aforesaid; that the mortgage put upon the same by said Hood, in favor of said Frellsen, be canceled, annulled and erased, and the sale thereof under said executory process foreclosing said mortgage, or any other process against Hood, be enjoined and prohibited; that said Frellsen be ordered and decreed to convey to complainant one-half of Black Bayou plantation, which he had retained by some arrangement with William Alling, the purchaser, and to pay to complainant the sum of sixteen thousand dollars, received from said Alling for the sale of the other half of said plantation, together with interest thereon from the date of said sale, and for general relief, process, etc.

And your petitioner also shows that he exhibited and filed in said cause a supplemental bill of complaint, averring the necessity, and praying the appointment, of a receiver of said real estate, under seizure as aforeaid.

Your petitioner also avers that the defendants in said cause, having been duly served with process of subpœna therein, and having failed to appear, plead answer or demurrer to said bills, or either of them, within the delay allowed in such case, a decree pro confesso was entered against them, which was afterward set aside, so far as the defendant, Frellsen, was concerned; whereupon he interposed and filed what he styled his "demurrer pleas and answer," wherein he asserted the validity of the judgment confessed by Hood in his favor, the proceedings in execution thereof, and the sale of Hood's property thereunder to him; and denied the charge of fraud, simulation and collusion contained in said bill of complaint. He admitted the execution of the counter letter, but averred that it became inoperative before "the order was made on the petition" of Hood to be declared a bankrupt; that the agreement with Hood in May, 1871, whereby he sold two of the said plantations to him, was a new agreement; and that the mortgage he was seeking to foreclose, was the one then granted to secure the price of said sale. He also pleaded the limitation of two years to the action, and to the jurisdiction of the court over any controversy between him and Hood. Other averments not material are contained in both said bill and answer, which need not now be set forth.

Your petitioner further shows and avers that he filed a general replication to the aforesaid answer; that the respective parties caused testimony to be taken and proofs made in their behalf; and afterwards said cause came on to be heard before said District Court upon the pleadings, exhibits and proofs, and exceptions to testimony, and was argued by counsel; that upon consideration thereof said Court, after disposing of the exceptions to testimony, declared and decreed: "that the judgment in favor of Henry Frellsen against "Govy Hood, in the Parish of Carroll, in the year 1866, and the "executions thereunder in 1868, with the sales and conveyances by

"the Sheriff, as shown in the record, have been established as valid "and operative; and that no fraud, collusion nor malpractice is "established against him; that these proceedings *entitle him to the "property so conveyed to him, discharged of any claim of the plain-"tiff in this suit.*" And it was further decreed: "that whatever "*surplus* may arise from the sale of the property under the process "in favor of Henry Frellsen, from the District Court of East "Carroll Parish, which is described in the plaintiff's bill, and "which is now held by the Sheriff, and has been levied on the "plantations known as the 'Home' place and 'Hood & Wilson' "place, the *said surplus shall not be paid to the said Hood, but "shall be paid to the complainant, as assignee*, as aforesaid, after "deducting such costs as this Court may decree shall be paid out "of the same." Said decree also dissolved the injunction restraining the execution of the process in the Sheriff's hands, and he is "permitted to proceed and execute the same, but, under the direc-"tion of this Court, is to dispose of the surplus that may remain "in his hands, after the payment of the debt therein specified as "due to the said Frellsen, and costs of suit as above directed." Said decree granted leave "to the complainant to "apply for further "orders regulating the sale in time and as to appraisement and "sale upon credit, according to the laws of Louisiana," and "di-"rected the Sheriff to make a return to this Court of the sale herein "allowed, and reserves the question of costs until the coming in of "such return."

And your petitioner further shows and avers that he thereupon duly removed said cause by appeal from said decree to the United States Circuit Court for the Fifth Judicial Circuit and District of Louisiana; and afterwards the said defendant, Frellsen, appeared in said Circuit Court and moved said Court to dismiss said appeal for want of jurisdiction in said Court over said cause, because said decree appealed from *was not a final decree*, from which an appeal would lie; which motion was argued by counsel; and on consideration thereof by said Court, Hon. Don A. Pardee, Judge of said Circuit, presiding alone, said Court sustained said motion and dismissed said appeal with costs; which pleadings, proceedings and decree in said District and Circuit Courts more fully and at large appear in the copy of the record thereof hereto annexed a made a part hereof.

Your petitioner avers that he is advised and believes that said decree of said District Court is a final one within the meaning of the statute authorizing appeals in such case, and that said determination and decree of said Circuit Court that said decree was not final, and that said Court was without jurisdiction of said cause, and dismissing said appeal, is erroneous.

And petitioner avers that said Court still refuses to entertain jurisdiction of said appeal, to the wrong and injury of your petitioner, who is without other remedy in the premises, as he is advised and believes.

Wherefore the premises considered your petitioner prays that this Honorable Court take cognizance of the premises and of the said grievance of your petitioner, who is without other adequate

remedy in the premises than the exercise of the authority of this Honorable Court to redress the same, and that your Honors grant unto your petitioner a writ of mandamus alternative in form, directed to the judges of said Circuit Court of the United States for the Fifth Judicial Circuit and Eastern District of Louisiana, commanding them to take cognizance and jurisdiction of said controversy and demand of your petitioner against said Frellsen and others upon appeal in said court, and to reinstate said cause and to hear and determine the same, and that your Honors lay a rule upon them to that effect, or that they be and appear before this Honorable Court on a day certain to be fixed by your Honors, and show cause, if any they have or can show, why a peremptory writ of mandamus to the same effect and extent, or to such extent and effect as to this Honorable Court shall appear meet and just, shall not issue from this Honorable Court in this behalf; and that after due proceedings had your Honors do grant a peremptory writ of mandamus as herein and hereby prayed, and such other relief as to your Honors may seem meet and just, and your petitioner will ever pray.

EMERY E. NORTON,
Petitioner.

J. D. ROUSE,
Counsel for Petitioner.

STATE AND EASTERN
District of Louisiana. } S. S.

Emery E. Norton this day, personally appeared before me, and being first duly sworn according to law, deposed and said, that he knows the contents of the foregoing petition, and that the statements thereof are true, except such as are stated on information and belief and those he believes to be true.

NEW ORLEANS, La., March 6th, 1883.

F. A. WOLFLEY,
U. S. Commissioner,
Eastern District of Louisiana.

[SEAL.]

United States of America, Circuit Court of the United States for the Fifth Judicial Circuit and Eastern District of Louisiana.

EMERY E. NORTON, Assignee, vs. GOVY HOOD *et als.* } No. 9551.

Extracts from Transcript of Appeal from U. S. District Court.

Filed November 7, 1881.

District Court of the United States for the District of Louisiana.

EMERY E. NORTON, Assignee, vs. GOVY HOOD *et al.* } No. 11,414.

Bill of Complaint.—Filed July 10, 1879.

To the Honorable EDWARD C. BILLINGS, Judge of the District Court of the United States for the District of Louisiana:

Emery E. Norton, of the State of Louisiana, and City of New Orleans, in his capacity as assignee of the bankrupt, Govy Hood, by virtue of the appointment of this honorable court, on the 24th day of February, 1869, in proceedings No. 888 of the docket of said court, brings this, his bill of complaint, against Govy Hood, of the Parish of East Carroll, State of Louisiana; John Asberry, of said parish and State, and Henry Frellsen, of the City of New Orleans, and State of Louisiana, all being residents and citizens of said State. And, thereupon, your orator complains and says:

That on the 29th day of December, 1868, Govy Hood, then and now residing in the State of Louisiana, Parish of East Carroll, presented to this honorable court his petition under the act of Congress of March 2d, 1867, entitled, "An act to establish a uniform system of bankruptcy throughout the United States," and asked to be declared a bankrupt under the provisions of said act; that on January 26, 1869, he was so declared a bankrupt; that on the 24th day of February, 1869, your orator was appointed and confirmed as assignee of said bankrupt's estate, and has continued to act as, and remain such assignee down to this time, and is still such assignee; that as such assignee an assignment, in due form of law, was made to him, on the 25th day of February, 1869, by the Register in Bankruptcy (to whom reference had been made in the matter), of all the estate, real and personal, of the said Govy Hood, including all the property of whatever kind of which he was possessed, or in which he was interested or entitled to have, on the 29th day of December, 1868, and all his deeds, books and papers relating thereto; that on the day of November, 1869, said Hood presented his petition for discharge, and was duly discharged by judgment of this honorable court, rendered and signed on January 27th, 1871. All of which will more

fully appear by a copy of the proceedings in said matter, No. 888, hereto annexed and made part of this bill, and marked exhibit "A."

Your orator avers that in January, 1866, Govy Hood was the owner of the following described real estate in the Parish of Carroll, well worth the sum of $100,000, to wit:

1st. A certain plantation, known as "Black Bayou," fronting on the upper end of "Lake Providence," and "River Bayou," bounded on the east by lands of the estate of D. F. Blackburn, on the north by lands of Selden Spencer and I. D. Kerr, and on the west by lands of Joseph D. Patton, containing in the aggregate, 840 acres, more or less.

2d. A certain plantation, known as the "Home Place," situated on the south side of Lake Providence, bounded in front by Lake Providence, on the left, or west, by Oakland plantation, formerly owned by W. B. Sellers; on the right, or east, by the plantation of Elizabeth Bosworth, deceased, and on the rear, or south, by lands formerly owned by the estate of John Chambliss, known as "Jefferson Ridge," containing in the aggregate, 1500 acres, more or less.

3d. The undivided half of a certain plantation on the Mississippi river, below the town of Providence, and known as the "Hood & Wilson Place," said plantation being bounded on the front by the Mississippi river; on the south, or below, by the plantation known as the "Haggaman Place;" on the north, or on the rear, by the plantation known as the George G. Wilson place, and bounded above by the lower line of the town of Lake Providence, containing, in the aggregate, 692 acres of land.

4th. Certain tracts of land in said Parish, described by official survey as the SE ¼ of Sec. 48, SW ¼ of Sec. 49, the NE ¼ of Sec. 57, Lots 1 and 7 of Sec. 60; Lots 1, 2, 3, 4, 5, and 6 of Sec. 57; Lot 3 of Sec. 71; Lot 4 of Sec. 55; Lots 5, 6 and 7 of Sec. 51; Lots 1, 2 and 3 of Sec. 54; all in Township 21, Range 12 East; also the undivided half of W ½ of Sec. 62, same T. and R.; containing in the aggregate 1992 75–100 acres.

That said lands were entirely unincumbered, except by a legal mortgage due by said Hood to his wife, Mrs. Julia Hood, for some $20,000.

That notwithstanding these facts, the said Hood was largely insolvent, and, among others, was indebted in the sum of $39,319 49 to Henry Frellsen, of New Orleans, who was a partner in the firm of Frellsen & Stevenson and the successor thereof, had been the confidential friend, cotton factor and commission merchant of said Hood from about the year 1847, for which sum the said Govy Hood confessed judgment in favor of said Frellsen in April, 1866.

That the utter and total insolvency of said Hood was well known to the said Frellsen during the whole of said years 1866, 1867 and 1868, and that said Frellsen actually advised said Hood to go into bankruptcy and relieve himself from his debts.

That in the month of July, 1868, said Frellsen pretended to issue execution on his said confessed judgment, and pretended to advertise for sale the three plantations first above mentioned, and did, on

the 5th day of September, 1868, pretend to purchase the same for the price and sum of $24,000.

That on the 23d day of November, 1868, said Frellsen pretended to issue an *alias fi. fa.* on said judgment, and to seize and advertise for sale the 1992 75–100 acres of land last above described, and to buy the same for the sum of $664 27 on December 5, 1868.

That in the month of December, 1869, said Frellsen pretended to sell one-half of the plantation first above described, and known as Black Bayou, to William Alling for the price and sum of $16,000, which sum the said Frellsen received in cash and for which he gave credit as hereinafter mentioned.

That on the 1st day of May, 1871, the said Frellsen did pretend to sell and convey all of the above mentioned and described properties, except the plantation known as Black Bayou, to the said Hood for the sum of $30,152, payable in seven installments, and evidenced by mortgage notes.

Now your orator avers that all of the before mentioned sales, transfers and proceedings, except the sale of one-half of Black Bayou to William Alling, were fraudulent simulations of the grossest kind, concocted and executed by the said Hood and Frellsen for the twofold purpose of enabling said Hood to put his property beyond the reach of his creditors and of enabling said Frellsen, by means of an unlawful preference, to obtain payment of his claim in full; that to that end it was agreed that Frellsen should nominally execute his said confessed judgment, and should nominally buy in all of the property of said Hood, and should hold the same in his name until after the said Hood should have obtained his discharge in bankruptcy, at which time a reconveyance should be made to said Hood; that the said Hood should remain in possession and control of the properties so nominally sold, and that although the title should nominally remain in Frellsen, the property should be the property of Hood, who was to be liable for all taxes, costs and expenses thereon accruing, or accruing from the nominal execution of said confessed judgment, and to be entitled to all rents and revenues therefrom derived, and the proceeds of all sales of any part thereof; that the terms and conditions of this fraudulent agreement on the part of Frellsen were that he was simply to receive the amount of his judgment, principal and interest and costs in full, that he was to be considered only as the nominal owner of the property, and that a formal reconveyance of the same was, at the proper time, to be made to Hood.

That, accordingly, said Frellsen, in July, 1868, issued execution on his said confessed judgment, that Govy Hood at the foot of the writ pretended to point out in writing the properties hereinbefore mentioned except the 1992.75 acres of wild land, and that on the 5th day of September, 1868, the sheriff of Carroll parish pretended to adjudicate the same to Henry Frellsen for the sum of $24,000, about one-fourth of their actual value.

That, under said pretended writ, no possession of said properties was ever taken by the sheriff, and that Govy Hood's possession of said plantations has been continuous and uninterrupted from the

year 1812 down to this moment; that on the 23d of November, 1868, an *alias fi. fa.* was issued on said confessed judgment, and thirteen days thereafter, with Hood's written consent of the waiver of legal delays and legal advertisements, the said 1992.75 acres of wild land was nominally adjudicated to Frellsen for the ridiculous price of $664 27.

That during the whole time that said Hood was in bankruptcy, to wit: from December 29th, 1868, to January 27th, 1871, he remained in possession and control of said properties—except Black Bayou as hereinbefore explained—and regularly paid the taxes on the same; that, during the whole of this period, he was treated as the owner by said Frellsen, who corresponded with him as such and conferred with him as such about the sale of the Black Bayou plantation, as hereinafter explained, and who accounted to him as such for some of the rents and revenues therefrom received by the said Frellsen, and for the proceeds of the sale of the Black Bayou plantation, to wit: the sum of $32,000, which said sums were credited by said Frellsen during said period when Hood was an undischarged bankrupt, on the said confessed judgment, and that the sum of $30,152 for which said Frellsen pretended to reconvey said properties, except Black Bayou, to said Hood on the 1st day of May, 1871, was the amount which said Frellsen claimed as a balance due him in the above mentioned confessed judgment and account between the parties after crediting the same with the revenues above referred to, with the proceeds of the sale of Black Bayou above referred to, and with certain other assets held by said Frellsen in trust for said Hood before and at the time he was declared a bankrupt.

That the sale of the Black Bayou plantation above referred to was made in December, 1869, by said Hood to Wm. Alling for the price and sum of $32,000, for which amount said Frellsen gave said Hood the credit above mentioned; that Frellsen received $16,000 of the above sum, or its equivalent, in cash from Wm. Alling, and that for the other $16,000 he, by some arrangement with Alling, unknown to your orator, decided to keep and own one-half of the Black Bayou plantation which was already nominally his, and which was intended by the parties to become really and actually his.

Now your orator avers that the above statement of facts shows that at the time said Hood was declared a bankrupt in December, 1868, he was the sole and real owner of all the properties above described, although they were standing under simulated and fraudulent titles in the name of Henry Frellsen, and that they passed to your orator by the assignment hereinbefore mentioned, on the 29th day of December, 1868, and that your orator is entitled to recover the same from the said Hood and the said Frellsen, with revenues at the rate of $10,000 per annum from December 29th, 1868, and is also entitled to recover from the said Frellsen the $16,000 received by him from Wm. Alling as the price of one-half of Black Bayou, with interest from December, 1869.

Your orator further avers that the fraudulent conspiracy between said Hood and said Frellsen, above set forth, was not known to your orator until within a few weeks past, and that the same was not

known to anybody except to the said Hood and Frellsen and to their attorneys, Edward Sparrow and J. W. Montgomery, until the month of December, 1878, when the existence of this fraud was brought to light during the trial of a law suit between said Frellsen and Hood, and made to appear by the testimony of the parties and the production of a counter letter between said Hood and Frellsen, dated October 26th, 1868, which said counter letter had been since its date in the uninterrupted possession of Edward Sparrow, attorney-in-fact and attorney-at-law of said Frellsen and Hood, and as will appear by the evidence herein to be adduced, and as does appear by the counter letter itself, one of the participators and beneficiaries therefrom.

That no amount of diligence or of vigilance on the part of your orator would have enabled him to discover said fraud prior to the trial of said lawsuit and the production of said counter letter at the term of the Thirteenth Judicial District Court, for the Parish of Carroll, in December, 1878, for the reason that the essential evidence going to show the same was rigidly concealed from the whole world, and the knowledge of it was not communicated to any one prior to said time.

Your orator further avers, that the litigation above referred to between said Hood and Frellsen, grew out of the attempt of said Frellsen to foreclose the mortgage given him by said Hood on May 1, 1871, to secure the sum of $30,152, which was the pretended price of the pretended retransfer to Hood by Frellsen; that Frellsen sued out in said Thirteenth District Court, for the Parish of East Carroll, executory process on said mortgage and notes, which process the said Hood enjoined on the grounds and for the purpose set forth in the copy of the record hereto annexed and marked "B."

That, as will appear by the copy of the opinion and decree of the Supreme Court of the State of Louisiana, hereto annexed and made part hereof and marked exhibit "C," the said court refused to inquire into the controversy between the parties, on the ground that no court would listen to one alleging his own villainy, and the interposition of a court of justice could not be invoked by a dishonest bankrupt to enable him to reap the results of a successful fraud upon the law and upon his creditors; that said court therefore dissolved the injunction sued out by Hood.

That, as a consequence of the dissolution of that injunction, said Frellsen is proceeding to execute his said executory process on the properties above described as the "Home Place," and the "Hood and Wilson Place;" that he has seized the same under said process and will proceed, on July 19th, 1879, through John Asberry, Civil Sheriff of the Parish of East Carroll, to sell the same, unless he and the said sheriff are restrained and prohibited by the equitable writ of injunction from this honorable court; that such injunction should issue, provisionally, to prevent this sale of the property of your orator and to prevent thereby an irreparable injury to him.

That on April 30, 1870, while said property, known as the "Hood and Wilson Place," was in the name of Henry Frellsen, the partition of the same was made between the heirs of Wilson and Frell-

sen, for the benefit of Hood, and the divided south half thereof was set apart, nominally to Frellsen, but actually to Hood, who also received in said act of partition, for the benefit of Hood, certain mortgage notes for which he never accounted to the said Hood, and which was one of the causes of controversy between them.

That your orator makes the above allegations to show that the undivided half of the Hood and Wilson place has become a divided half, and to show, further, the character of the relations between said Hood and Frellsen with reference to this property during the bankruptcy of the former.

And, for the purpose of showing in Frellsen the consciousness of fraud in these transactions with Hood, your orator avers, that after the scathing decision of the Supreme Court rendered in the matter above referred to, and before the same came to the knowledge of your orator, the said Frellsen fearing that your orator would become acquainted with the facts of this fraud, and would institute these proceedings, attempted to procure your orator's resignation as assignee of said Hood, and the filing and acceptance of his account for the purpose of closing up and winding up said estate, and of making it impossible that this suit should be brought; that your orator, not suspecting or knowing the origin, cause or object of such resignation, and the filing of such account, did actually present the same to the Court, which fortunately did not act upon them, and which your orator withdrew as soon as the facts of this case came to his knowledge.

And for as much as your orator can have no adequate relief except in this Court, to the end, therefore, that the said defendants may, if they can, show cause why your orator should not have the relief hereby prayed, and may upon their corporal oaths, according to their best and utmost knowledge, remembrance, information and belief, full, true, direct and perfect answer make to the premises, and to all the several matters hereinbefore stated and charged, as fully and particularly as if severally and separately interrogated as to each and every of said matters, and that your orator may be decreed the owner, in his capacity of assignee, of all the properties hereinbefore mentioned, from the 29th day of December, 1868, and entitled to recover from Govy Hood and Henry Frellsen the rents and revenues thereof, and that said Govy Hood may be ordered to retransfer to your orator said Home Place and said divided south half of the Hood and Wilson place and said 1992 75–100 acres of wild lands, and that said Henry Frellsen may be ordered and decreed to pay to your orator the $16,000 received by him from Wm. Alling for the sale of one-half of the Black Bayou plantation, with interest from December, 1869, and to make to your orator a transfer of the other half of said Black Bayou still standing in his name, and that the mortgage put upon said land by said Hood in favor of said Frellsen on May 1, 1871, for $30,152 may be canceled, annulled and erased, and that said defendants, Henry Frellsen and John Asberry, Sheriff of the Parish of East Carroll, their agents, deputies and attorneys, may be restrained and enjoined, preliminarily, provisionally and perpetually, by the order and injunction of this Hon. Court,

from executing, or attempting to execute, directly or indirectly, the executory process now in the hands of said Sheriff in the case of Henry Frellsen vs. Govy Hood, No. ———, of the docket of the 13th Judicial District Court for the Parish of East Carroll, or from selling, or attempting to sell, under said process, or any other process against Govy Hood, the properties hereinbefore described, and belonging to your orator in his capacity aforesaid, and that defendants may be decreed to pay the costs of this suit, and that your orator may have such further relief, or such other general relief, as to this Honorable Court shall seem meet and shall be agreeable to equity.

May it please your Honor to grant unto your orator the writ of injunction, as well preliminary and provisional as perpetual, issuing out of and under the seal of this Honorable Court, commanding, enjoining and restraining the said Frellsen and the said John Asberry, their agents, attorneys and deputies, and each and every of them, as is hereinbefore in that behalf prayed, and may it please your Honor to grant unto your orator the writ of subpœna, issued out of and under the seal of this Honorable Court, directed to the said Govy Hood, Henry Frellsen and John Asberry, Sheriff of the Parish of East Carroll, defendants, commanding them by a certain day and under a certain penalty to be and appear in this Honorable Court, then and there to answer the premises, and to stand to and abide such order and decree as may be made against them. And your orator will ever pray.

(Signed) W. G. WYLY,
THOS. J. SEMMES,
E. H. FARRAR,
Solicitors for Comp'nt.

On this 3d day of July, in the year of our Lord 1879, personally came and appeared before me, the undersigned authority, Emery E. Norton, who being by me duly sworn deposes and says: That he has read the foregoing bill of complaint subscribed as above and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

E. E. NORTON.

Subscribed and sworn before me on the day and date aforesaid.
JONATHAN INGERSOLL,
U. S. Comm'r, Dist. of Connecticut.

Supplemental Bill.—Filed July 10th, 1879.

To the Honorable Edward C. Billings, Judge of the District Court of the United States for the District of Louisiana:

Emery E. Norton, of the State of Louisiana and city of New Orleans, assignee of the bankrupt Govy Hood by appointment of this Honorable Court in proceedings No. 888 of the docket hereof, brings this, his supplemental bill, against Govy Hood and John Asberry in his capacity as sheriff of the Parish of East Carroll, both of said Parish of East Carroll and State of Louisiana, and against

Henry Frellsen, of the city of New Orleans and State of Louisiana.

And, thereupon, your orator complains and says, that he has heretofore filed in this Honorable Court a bill against these same defendants to compel the transfer to him of certain lands owned by said Hood at the time of his bankruptcy and fraudulently concealed and withheld from your orator at that time by simulated transfers to Hy. Frellsen, and for other purposes, as more fully appears by reference to said original bill heretofore filed. That on said original bill a restraining order has issued to prevent the sale of the two plantations known as the Home Place and the Hood & Wilson Place, which was advertised to take place on July 19, 1879.

That said restraining order will remain in force until November, as the application for injunction cannot be heard before that time; that said plantations were, prior to the seizure thereof by said Frellsen, leased by Govy Hood to J. Shelby Irvine, Esq., who has subleased them to various and sundry colored lessees; that these sublessees have at this time flourishing crops on said lands leased by them, but are dependent upon somebody to furnish them supplies to complete and gather the same; that Govy Hood is utterly insolvent and entirely unable to furnish such supplies; that the sheriff who is in possession of said property under said writ of seizure and sale, has no authority and no means to make any such advances, and that Mr. Irvine, although desirous, refuses so to do because he fears that he would lose the same, or that he would have some harassing lawsuit about it with the seizing creditor.

Your orator avers that unless some immediate and prompt action is taken the crop for the year 1879 on said plantations will be utterly lost, and that the agricultural laborers thereon will become disheartened and demoralized and will abandon said plantations to the almost irreparable injury thereof, and that it is to the interest of all parties that a receiver should be appointed to take charge of said plantations, provisionally, during the pendency of the application for an injunction herein filed, by whose authority the tenants can be supplied, the growing crop saved and the laborer kept upon the plantations.

That as said plantations belong to, and were vested in your orator on the bankruptcy of said Hood, in 1868, and as said Hood is totally insolvent, and will or may collect and use the revenues that will arise therefrom, and which belong to your orator, in which event they would be totally lost, and could never be recovered from said insolvent, and as the possession of said plantations would revert to Hood in case your Honor should, on the hearing, grant the injunction prayed for in the original bill against the sheriff, now in possession of the same, it is absolutely necessary that some proper person living in the neighborhood should be appointed receiver of said plantations, with power to lease and conduct the same to best advantage of all parties.

To the end, therefore, that the said defendants may, if they can, show cause why your orator should not have the relief thereby prayed, and may, upon their corporal oaths, according to their best and utmost knowledge, remembrance, information and belief, full, true, direct and

perfect answer make to the premises, and to all the several matters hereinbefore stated and charged, and separately interrogated as to such and every of said matters; and that your Honor will immediately appoint a provisional receiver, who shall, during the pendency of the application for injunction, made herein in the original bill, have authority to take charge of and manage said "Home" and "Hood and Wilson" plantations, and do all things necessary and proper to preserve the growing crop thereon, and to keep the laborers from abandoning the same, for the benefit of all the parties concerned; and that your Honor, on the trial of said application for injunction, will grant the same, and will at the same time, on due notice given thereof, confirm the appointment of the provisional receiver, and give him power and authority to manage and control said plantations during the pendency of this litigation, and that the court will decree fully as prayed for in the said hereinbefore filed original bill.

May it please your Honor to grant unto your orator writs of subpœna directed to said defendants, Govy Hood, John Asberry and Henry Frellsen, respectively, commanding them, and each of them, to appear on a certain day, and under a certain penalty, before your Honor, in this court, and then and there answer this supplemental bill, and abide the order and decree of the court.

W. G. WYLY,
T. J. SEMMES,
E. H. FARRAR,
Solicitors.

On this 3d day of July, 1879, personally came and appeared before me, the undersigned authority, Emery E. Norton, who, being by me duly sworn, deposes and says: That he has read the above supplemental bill as above, and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters which are therein stated on his information or belief, and that as to those matters he believes it to be true.

E. E. NORTON.

Sworn and subscribed before me the day and date aforesaid.

JONATHAN INGERSOLL,
U. S. Com'r, Dist. of Connecticut.

Order of Court.

Let this bill of complaint and the supplemental bill herein be filed, and let the defendants named in the within bill of complaint show cause, on the 3d Monday of December, A. D. 1879, why the injunction *pendente lite* therein prayed for should not be granted, and why the receiver asked for in the supplemental bill should not be appointed; meanwhile, and until the hearing upon this order, let the restraining order issue restraining the defendants, and each of them, according to prayer of the said bill, and let J. Shelby Irvine be appointed custodian of the Home and Hood and Wilson plantations,

with the ordinary powers of receiver, so far as relates to the making the crops and the management of said plantations, with leave to either party to apply to the court for any further order in the premises.

July 3, 1879.

EDWARD C. BILLINGS,
Judge.

Pro Confesso. Entry at Rules November 3, 1879.

E. E. NORTON, Assignee, *vs.* GOVY HOOD *et al.* } No. 11,414.

On motion of Wyly, Semmes and Farrar, Solicitors for the complainant, and on suggesting that the defendants were all served with subpœnas in chancery more than 20 days before the rule day in September, 1879, on which day they were ordered to appear, plead, answer or demur, and that they have all failed so to do up to this date,

It is ordered that the bill and supplemental bill herein filed be taken *pro confesso* against all the defendants, to wit: Govy Hood, Henry Frellsen and Jno. Asberry, Sheriff of the Parish of East Carroll.

Order. Pro Confesso Set Aside as to H. Frellsen, November 17, 1879.

E. E. NORTON, Assignee, *vs.* GOVY HOOD *et als.* } No. 11,414.

On motion of H. G. Morgan, solicitor for the defendant, Henry Frellsen, ordered that the *pro confesso* entered on the 3d day of November, 1879, be set aside, so far as said Frellsen is concerned, and that he have leave to file demurrer, plea or answer to the bill.

Demurrer, Pleas and Answer of Henry Frellsen.—Filed 17th November, 1879.

E. E. NORTON, Assignee, *vs.* GOVY HOOD *et als.* } No. 11,414.

The District Court of the U. S., District of Louisiana.

The demurrer, pleas and answer of Henry Frellsen, a defendant in a suit commenced in this Court by bill against him and other defendants in chancery, by E. E. Norton, assignee in bankruptcy.

This defendant reserves all benefit of exception to the bill because of its manifold defects, errors and untruths; also he reserves the advantage of plea and demurrer to such parts of the bill as he may be advised it is proper to plead or demur to, and for answer, says:

1st. He admits that the co-defendant Hood was owner of the lands

described in the bill, and which are included in the deeds of the Sheriff of the Parish of Carroll to him, as hereafter mentioned, in the year 1866, and after, until the same came to the ownership of respondent in the year 1868. The defendant does not admit that these lands could have produced the sum mentioned in the bill, or a like sum, at any sale, public or private.

2d. The defendant admits and asserts that the said Govy Hood, in February, 1866, was indebted to him to the principal sum of $39,810 92-100, evidenced by notes dated 1862 and bearing interest at the rate of 8 per cent per annum till paid, and that in February, 1866, there had accrued $10,102 63-100 of interest on the notes, making a debt of $49,921 59-100 on the 13th of February, 1866.

3d. The defendant, further answering, says the said Govy Hood confessed a judgment for the principal and accrued interest of the said notes in the District Court of the Parish of Carroll, which was never annulled, reversed, or in any manner impaired during all the proceedings hereafter mentioned, but remained in full force and operation and valid and binding upon the said Hood, and was duly recorded in the book of the Recorder of Mortgages shortly after it was confessed, and was a judicial mortgage binding all the lands of the said Hood before mentioned from about February, 1866.

4th. The respondent says that in 1868 this respondent caused an execution to be issued and to be levied upon the lands of the said Hood, as mentioned in the bill, and afterwards in the same year an alias execution was issued and levied upon other lands.

That under these executions the lands were legally and duly advertised and sold by the sheriff at public sale, and this respondent became the purchaser and received the sheriff's deed, and was thereby vested with all the rights, title and interest of the defendant, Hood.

All of which will appear by a record of the judgment, executions, returns, and the deeds to this respondent as purchaser, to be filed with this answer marked exhibit "A."

And this respondent says that it is not true there was any pretended sale or simulated titles, but he avers that the sale was a serious and determinate exercise of his unquestioned legal right to coerce payment of a valid and unsatisfied judgment by a sale of the property of his debtor which was legally subject to it. The debt had increased from 1866, by the addition of interest to be above the sum of sixty-one thousand dollars, a sum which Hood had no ability to pay, except by the sale of this property.

There was no occasion of any collusive or fraudulent agreement on the part of this respondent.

He had, from the magnitude of his debt, full power to sell and to buy the property, and there was no probability of competition.

The respondent states that the charges of the bill that there was any pretended simulation, fraud or collusion at the sale, or in the purchase, are destitute of the slightest foundation in matter of fact.

5th. For further answer this respondent says that after his purchase on September 5th, 1868, viz: on the 26th of October, 1868, he

made the agreement to sell the parcels of land mentioned in it to Hood, being all of the lands described in the sheriff's deed and his returns on the execution.

The consideration for this agreement, and the motives for it, are plainly set forth in the agreement.

The motives were a disposition to oblige and assist Hood, by affording him an opportunity to reinstate himself if he should find it practicable. The consideration was that Hood should pay, with exact punctuality, the debt he owed to him in the manner set forth in the agreement. It is stated and reiterated that upon a failure to meet the terms of the agreement by Hood, this respondent was to be discharged and relieved.

The agreement provides for the payment of an installment of $7000, and for the payment of the costs and expenses on or before the 15th December, 1868; for the payment of installments annually of $8000 for four years successively from that date; for payments to Sparrow & Montgomery. Not one of these payments was made.

On the 15th of December, 1868, Hood made default. In a fortnight after that day he petitioned to be declared a bankrupt. The agreement ceased to be operative before the order was made on the petition. The assignee took nothing from it. No right or claim to the property passed by that order to him. If he had funds to pay the installments then due, a court would not have compelled the owner of the property to perform a contract from which he was discharged and released by its terms.

This agreement is a distinct, original, independent agreement by this respondent, as the owner of the property, with Hood, who desired to purchase it by performing the engagement and stipulations it contains.

A copy of this paper is filed with the answer as exhibit "B."

6th. This respondent for further answer says, that the said co-defendant, Hood, was declared a bankrupt in February, 1869, and on the 26th of that month made the usual assignment to Norton, assignee. What title did Norton then acquire? He acquired the right, if there were any rights, vested in Hood by the agreement in October, 1868. A right to purchase the lands by a fulfillment of the terms of the agreement as made by the bankrupt, if that right had not been lost, or was then a valid and a subsisting right which could be enforced.

This respondent avers, that said Hood did not pay the installments of money contained in the agreement as he undertook, nor did he pay the costs and charges, and that neither Norton nor Hood have offered to do so, either in 1868, 1869, 1870 or afterwards, but the said agreement became nugatory.

This defendant avers that he did not convey nor lease the property to Hood nor to Norton during those years, but the same was under his own exclusive control and entirely subject to his title and possession as purchaser.

7th. For further answer, this defendant says, that the said Norton, as assignee, did not, from the date of his appointment as

assignee in 1869, to the date of the filing of this bill, offer to perform any of the conditions of that agreement nor make any demand upon this respondent for a conveyance, nor has any creditor of Hood's taken measures to controvert any of the rights of respondent to this property.

And this respondent charges that no creditor of Hood has proved any debt or claim against him in the court of bankruptcy, and that this is not a case brought for creditors, or a creditor, nor were there proceedings pending in bankruptcy at the date of the filing of the bill. There was, however, some intercourse between the said Norton and this defendant and his attorney, General Edward Sparrow, of Carroll parish. After Hood had been adjudicated a bankrupt, his assignee, Norton the present plaintiff, threatened respondent's attorney, Edward Sparrow, with proceedings looking to the recovery, by him as assignee, of all the lands mentioned in the bill, and which had been acquired by respondent at sheriff sale, in 1868, unless this respondent would pay him (Norton) the sum of one thousand dollars, declaring that he believed that respondent's titles to the said property were simulated and void and that the entire property still belonged to the bankrupt or his estate, but that the payment to him (Norton) of $1000, as aforesaid, would quiet respondent's title and avoid all difficulty in the matter. Gen. Sparrow called at respondent's office in this city and told him of this threat and attempt to extort money from him, and further stated that Norton desired to see this respondent. Respondent asked his attorney, Sparrow, for his opinion and advice in the matter, whereupon Sparrow replied that Norton could not interfere with the property, that it belonged to this respondent in law and in fact, and that Norton's threat was only made to induce respondent to pay him $1000, which threat and proposition respondent should indignantly repel, and for that purpose he (Sparrow) advised a visit to Norton at his rooms.

Respondent accordingly went to the rooms occupied by E. E. Norton, assignee, in company with Edward Sparrow, and, when there, Norton repeated to respondent what he had told Sparrow in relation to the payment of $1000 in order to quiet his title, whereupon respondent replied that he did not think Norton, as assignee of Hood, had any right or claim to the property which respondent had acquired at a judicial sale in the parish of Carroll, and that he most positively declined to pay him (Norton) the $1000 demanded of him, or any other amount whatever.

A lengthy and angry discussion followed between Sparrow and Norton in the presence of this respondent, Sparrow endeavoring to prove to Norton that repondent was the lawful owner of the property, and that any proceedings which he (Norton) might take as assignee would only prove vexatious.

Norton turning to respondent urged him to think over the matter, and warned him that if the $1000 was not paid to him as required, that he would give respondent much trouble and make it cost him much more in the end.

Respondent heard nothing further on the subject for a long time

thereafter, nothing indeed until about the time that Hood made application for his discharge in bankruptcy. About that time Hood called at respondent's office, on Magazine street, and informed him, that Norton had told him (Hood) that he should not have his discharge until he had paid him (Norton) $1000; that he had denied his ability to do so, and that Norton had then told him to go to respondent and request him to advance the money and to tell respondent that if he did not do so that he (Norton) would give the respondent a great deal of trouble.

Respondent refused to advance any money and Hood left him.

Some time after Hood returned to respondent's office and stated that Norton had consented to take $500 and grant him his discharge and asked respondent to pay the amount for him, which respondent again declined to do, telling Hood that he might tell Norton to go ahead whenever he liked but that he would get no money out of him. The said Norton never did make any other or further claim on this respondent, nor did he contest in any manner the validity of his judgment or the validity of the sales made under it, nor did he seek in any manner to become a party to the agreement made in 1868 for the resale of the said property to the said Hood.

The insinuation in the bill that there was any concealment of that agreement by this defendant or that there was any disposition or desire to keep the knowledge of it from said assignee, is wholly without any foundation in truth.

This respondent was not only willing but earnest in his desire that the said Hood should fulfill his contract. This defendant in making the contract exercised his own independent judgment of his own rights, and dealt with Hood as an independent party competent to contract.

There was no design to have any collusion by agreements, or to establish any other expectations or rights than those plainly expressed.

This respondent denies that there were any collusive or unexpressed agreements, or that there was any intent or purpose to hinder, delay or defeat the claims of any party whomsoever by any of the acts done by this respondent.

This defendant avers that the allegations of the bill in contradiction of these statements are wholly untrue and unfounded. And this defendant pleads that this claim is inequitable and unjust, that it is moreover stale and barred by the lapse of time, and by the terms of the 5052 section of the Revised Statutes of the United States, as well as by the principles of equity jurisdiction and as this respondent pleads.

8th. This respondent further answering, says that he has now disposed of all the matters of charge or allegation, and has answered to the contracts and acts which preceded the bankruptcy of the said Hood and his assignment to Norton and to the intercourse with Norton prior to the discharge of Hood as a certificated bankrupt in 1870.

By the discharge of Hood as a bankrupt the balance due on the

judgment after the sales made in 1868, and the credit for those sales was discharged as a debt.

This respondent had no claim on the discharged bankrupt for this balance of the debt. Nor had this respondent any claim on Hood upon his covenants in the agreement of 1868 for the sale of the property to him. That agreement was simply inoperative and valueless.

In May, 1871, this respondent and Hood made a new agreement relative to so much of the property as had not been sold by this respondent. One of the plantations was sold previously to that date by respondent.

Hood had received his discharge at this date.

This respondent sold and delivered to Hood the two plantations specified in the bill as the Home Place and the Hood & Wilson Place for the sum of $30,152, divided into six annual payments of $5025 each, with 8 per cent per annum interest, and Hood gave a mortgage on the property to secure the payment of his purchase money.

Under this contract the said Hood took possession, and the proceedings which this plaintiff has brought this bill to enjoin were commenced in the State Court to enforce the payment of the debt then and thus contracted.

These proceedings as enjoined are the result and consequence of a litigation which ensued in the State Court, and which was finally settled in the Supreme Court of this State at the close of its last term in June last, 1879.

The said Hood, under pernicious counsel, petitioned the District Court of East Carroll to restrain this respondent from selling the land for the payment of the notes, and so exuberantly did he deal forth charges of fraud and of collusion to defraud the creditors and his own intimate connection with those contrivances, that when the case came to the Supreme Court that Court accepted his own declarations as true in so far as they had reference to himself, and, to borrow from the bill of the plaintiff, they said:

"No Court would listen to one alleging his own *villainy*, and the interposition of a court of justice could not be invoked by a dishonest bankrupt to enable him to escape the results of a successful fraud upon the law and upon his creditors."

They dismissed his petition. The same parties prosecuting the suit for Hood, and who had maintained his villainy, as this defendant believes and is informed, sought this plaintiff, and have engaged him to lend his name to bring this suit. One attorney, at least, who prosecuted the luckless petition so redolent of confessed villainy, appears in this case.

The plaintiff is mistaken in supposing that this respondent made any attempt to obtain his resignation or designed any corruption of his immaculate integrity and official rectitude.

The most that was proposed was that he should settle his final account, which had been delayed for ten years.

The cause of the application this respondent is prepared to establish.

His connections had already been approached for compromise, and a bankrupt assignee named as an agent in further litigation, and that litigation menaced as affording a ground for compromise, so-called.

This defendant, further answering, says that he is well aware that this Court can not and will not entertain jurisdiction of any controversy between the respondent and Hood, citizens of the same State, whose controversy has proceeded to a final judgment in the Supreme Court of the State, and where the property has been seized under process validly issued by the State Court.

Nor can this Court entertain jurisdiction in favor of the said plaintiff, except as the fact shall fully appear that the bankrupt's estate is unsettled and that the cause is one properly arising in bankruptcy, for the bankrupt act is repealed, and all the jurisdiction of that Court in bankruptcy has been reduced to narrow limits and the equity powers of the Court diminished.

And this respondent brings to the notice of the Court that the suit commenced by this respondent in the 13th Judicial District Court for the Parish of East Carroll, is to enforce a mortgage to secure the purchase money on a sale which was made in 1871, after the discharge of Hood from bankruptcy and his relations to that Court had ceased.

That the property specified in the mortgage to this respondent was never within the possession, control or authority of this Court, or of the assignee, but that before any bankruptcy it had been judicially sold under a judgment of a Court of competent jurisdiction, rendered in 1866, for an undisputed debt in favor of respondent against Hood before the Bankrupt Act was enacted.

That there is not a particle of evidence of any conveyance of this property by the purchaser to any person whomsoever until the sale of the Black Bayou plantation in 1869 to William Alling and the sale in 1871 for the notes and mortgage which are the subject of the suit in the State courts, viz: the Thirteenth Judicial District Court of East Carroll and the Supreme Court of the State. That more than ten years elapsed from the sale of the property in 1868 till this bill was filed, and ten years have elapsed since the property of the bankrupt was assigned to this plaintiff without any claim upon the property by him, and that years have elapsed between the sale of the property of the bankrupt and the execution of the mortgage which this respondent is enforcing in the State court without any complaint.

It does appear that Hood in 1871 made the purchase, accepted the deed and executed the mortgage to secure the purchase money, and only after a default years thereafter was the very remarkable confession of turpitude made in a petition signed by attorneys employed for him.

The respondent submits that such confessions are very conclusive upon a suitor when they are a ground of his suit but are without any force as to any other person, and in so far as they apply to this defendant they are wholly untrue and without any foundation in fact.

This respondent prays that this answer may be taken as a demurrer to all of the claims or charges or prayers for discovery or relief in respect to the disturbance of or interferance with the proceedings in the District Court of East Carroll between the respondent and Govy Hood.

And this respondent pleads to the jurisdiction of the Court and prays judgment whether it will or can take cognizance of the controversy between this respondent and said Hood in that court.

And now having fully answered, this defendant prays judgment of the bill and that the same may be dismissed at the costs of the plaintiff.

H. G. MORGAN,
Solicitor for Defendant.
JOHN A. CAMPBELL,
Of Counsel for Defendant.

THE STATE OF LOUISIANA, }
City of New Orleans. }

Before me, personally came Henry Frellsen, a defendant in the case stated in the bill, who maketh oath and saith the matters of fact stated in the answer aforesaid of this deponent are true in substance and matter of fact.

(Signed) HENRY FRELLSEN.

Sworn and subscribed before the undersigned, a commissioner of the Circuit Courts duly appointed and sworn by the Circuit Court of the United States in and for the District of Louisiana at New Orleans, as witness my hand and seal, this November 15th, 1879.

[Seal.] ANDREW HERO, JR.,
Commissioner of Circuit Court.

Replication.—Filed March 1, 1880.

E. E. NORTON, Assignee, }
vs. } No. 11,414.
GOVY HOOD, *et al.* }

The replication of E. E. Norton, assignee of Govy Hood, complainant, to the answer and plea of Henry Frellsen, one of the defendants.

This replicant, saving and reserving to himself all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer and plea of the said defendant for replication thereunto, saith: That he doth and will aver, maintain and prove his said bill to be true, certain and sufficient in law to be answered unto by the said defendant, and that the answer and plea of the said defendant are very uncertain, evasive and insufficient in the law to be replied to by this replicant, without that, that any other matter or thing in the said answer and plea contained materially or effectually in the law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true. All of which

matters and things this replicant is ready to aver, maintain and prove as this Honorable Court shall direct, and humbly prays as in his bill he hath already prayed.

W. G. WYLY,
E. H. FARRAR,
Solicitors.

Hearing and Continuance. May 19th, 1881.

E. E. NORTON, Assignee, *vs.* GOVY HOOD *et al.* } No. 11,414.

This cause came on for trial, E. H. Farrar and J. D. Rouse appearing for complainant; J. A. Campbell and H. G. Morgan for defendant, Henry Frellsen.

And after hearing the pleadings, evidence and argument, the cause is continued till 20th instant at 12 m., the evidence offered by the parties being as follows:

FOR COMPLAINANT.

1st. Record of the bankruptcy of Govy Hood, No. 888 of the District Court of the U. S. for this District, including schedules and all proceedings therein.

2d. Certificate of the register of debts proved in said bankruptcy.

3d. The certified transcript of the record of proceedings in the case of Govy Hood vs. Henry Frellsen, lately pending in the 13th Judicial District Court for the Parish of East Carroll, State of Louisiana, and numbered on the docket thereof 6364, being the same transcript annexed to the bill herein as exhibit B., and particularly the testimony of C. H. Webb, A. H. Embry, Wm. M. Cullock, V. M. Purdy, Wm. Alling, E. C. Manning, C. E. Moss, S. T. Lellay, L. B. Clarkson, N. D. Ingraham, C. R. Egelly, Govy Hood and J. A. Guest, found in same transcript from page 24 to 61, and the letters and exhibits offered in connection with the said testimony. Also the counter letter or agreement of October 26, '68, between Frellsen and Hood, and the deeds and conveyances therein offered in evidence.

4th. Copy of opinion and decree of the Supreme Court of La. in same case.

5th. Extracts from the record of Dean vs. Frellsen, viz: letters of July 8 and August 10, 1868, from Henry Frellsen to Edw'd Sparrow, and letter of 1 Sept., 1868, from Sparrow & Montgomery to J. O. Pierce and N. M. Dean.

6th. Testimony of Govy Hood taken under commission and all exhibits thereto annexed.

7th. Testimony of E. E. Norton, complainant, taken by consent April 9th, 1881.

8th. Testimony of E. H. Farrar, also taken April 9th, 1881.

FOR DEFENDANT.

1st. The testimony of Henry Frellsen, taken by consent on 15th and 26th March, 1881, and all exhibits therein referred to or annexed.

2d. The testimony of Gen'l Edward Sparrow taken under commission and all exhibits therein referred to or annexed.

3d. Affidavit of H. G. Morgan, considered as a deposition.

4th. Affidavit of Wm. Grant, considered as a deposition.

5th. Additional testimony of Edward Sparrow, taken by consent February 18th, 1881.

6th. Testimony of Wm. R. C. Lyons taken under commission and all exhibits thereto attached.

Defendant files objections to certain evidence offered by complainant.

Hearing and Submission. May 21, 1881.

E. E. NORTON, Assignee, / *vs.* / GOVY HOOD *et al.* \ No. 11,414.

The trial of this cause was this day resumed, and after hearing further argument, the Court took time to consider.

Judgment Rendered June 13th, 1881.

EMERY E. NORTON, Assignee, / *vs.* / GOVY HOOD, HENRY FRELLSEN, *et al.* \ No. 11,414.

This cause came on to be heard in this Court upon the pleadings, exhibits, testimony, orders and exceptions to testimony at the hearing, and was argued by counsel.

The Court, upon consideration, admits the records of the suit of Govy Hood against Henry Frellsen, filed as exhibits and offered as testimony and of the bankruptcy of Hood as evidence of the existence of such suits and of what was done in them, and of the capacity of the plaintiff as assignee, but for no other purpose. The deposition of Frellsen, his letters, deeds and the documents signed by him are admitted.

No depositions in those causes, nor documents therein of other parties are admitted, except those documents referred to in the deposition of Frellsen.

The Court declares and decrees that the judgment in favor of Henry Frellsen against Govy Hood in the parish of Carroll in the year 1866, and the executions thereunder in 1868, with the sales and conveyances by the sheriff, as shown in the record, have been established as valid and operative, and that no fraud, collusion nor mal-practice is established against him, that these proceedings entitle him to the property so conveyed to him, discharged from any claim of the plaintiff in this suit.

The Court further declares and decrees that whatever surplus may arise from the sale of the property under the process in favor of Henry Frellsen from the District Court of East Carroll Parish, which is described in the plaintiff's bill, and which is now held by the sheriff, and has been levied on the plantations known as the Home place and the Hood & Wilson place, the said surplus shall not be paid to the said Hood, but shall be paid to the complainant as assignee as aforesaid, after deducting such costs as this Court may decree shall be paid out of the same.

The Court further decrees that the injunction heretofore allowed, restraining the execution of the process, be dissolved, and that the said sheriff is permitted to proceed and execute the same, but, under the direction of this Court, is to dispose of the surplus that may remain in his hands after the payment of the debt therein specified as due to the said Frellsen, and costs of suit as above directed.

Leave is granted to the complainant to apply for further orders regulating the sale in time and as to appraisement and sale upon credit according to the laws of the State of Louisiana.

The Court directs the sheriff to make a return to this Court of the sale herein allowed and reserves the question of costs until the coming in of such return.

(Signed) EDWARD C. BILLINGS, *Judge.*

Appeal—Granted June 18th, 1881.

E. E. NORTON, Assignee, / *vs.* / GOVY HOOD *et al.* — No. 11,414.

On motion of J. D. Rouse and E. H. Farrar, solicitors for the complainant, and on suggesting to the Court that he is aggrieved by the final decree herein rendered on the 13th day of June, 1881, and that he believes there is error therein to his prejudice, and that he desires to appeal from the same.

It is ordered by the Court that complainant be allowed an appeal from the said decree, returnable to the next term of the Circuit Court of the U. S. for the 5th Circuit and Eastern District of Louisiana, on the 1st Monday in November, 1881, on giving bond in the sum of $7500, if the said appeal is intended to operate as a supersedeas and to maintain the injunction herein issued; and on giving bond in the sum of $500, if the said appeal does not operate as a supersedeas and does not maintain the said injunction.

Notice of Appeal—Served on the Clerk of Court, June 18th, 1881.

E. E. NORTON, Assignee, / *vs.* / GOVY HOOD *et al.* — No. 11,414. U. S. District Court, East. Dist. of La.

To John Devonshire, Esq., Clerk of said Court:

Dear Sir—You are hereby notified that the complainant in this

cause claims the benefit of appeal from the decree herein, entered on the 13th day of June, that he has applied for and obtained an order for such appeal, and herewith files his bond.

Respectfully,

J. D. ROUSE,
E. H. FARRAR,
Solicitors.

New Orleans, June 18, 1881.

Appeal Bond—Filed June 18th, 1881.

Know all men by these presents, that we, Emery E. Norton, Assignee in bankruptcy of Govy Hood, as principal, and E. Howard McCaleb, as surety, are held and firmly bound, jointly and severally, unto Henry Frellsen, Govy Hood, John Asberry, Sheriff of the Parish of East Carroll, or his successor in office, in the sum of five hundred dollars, lawful money of the United States of America, to be paid to the said Henry Frellsen, heirs, executors, administrators and assigns, for which payment well and truly to be made we bind ourselves, and each of us by himself, and each of our heirs, executors and administrators firmly by these presents.

Sealed with our seals, and dated the 18th day of June, A. D. 1881.

Whereas, the said Emery E. Norton, assignee as aforesaid, having this day taken an appeal to the Circuit Court of the United States, in and for the Eastern District of Louisiana, from and to reverse the decree rendered on the 13th day of June, 1881, by the District Court of the United States for the Eastern District of Louisiana, in the suit of Emery E. Norton, assignee of Govy Hood, against Govy Hood and Henry Frellsen, No. 11,414 of the docket thereof.

Now the condition of the obligation is such that if the above bounded Norton shall prosecute his said appeal to effect, and shall answer all costs if he shall fail to make good his plea, then this obligation shall be void, otherwise to remain in full force and virtue.

E. E. NORTON, *Assignee*,
p. p. E. H. FARRAR, *Attorney*,
E. HOWARD McCALEB.

Signed, sealed and delivered in the presence of E. H. Farrar.

(Approved) DON A. PARDEE, *Judge.*

Personally appeared E. Howard McCaleb, who, being duly sworn, deposes and says: That he is the surety on the within bond; that he resides in the city of New Orleans and State of Louisiana, and is worth the sum of $500 over and above all his debts and liabilities, and property exempt from execution.

E. HOWARD McCALEB.

Subscribed and sworn to before me this 18th June, 1881.

(Signed) K. LOEW,
U. S. Comm'r.

**Notice of Appeal to Jno. Asberry.*

LAKE PROVIDENCE, La., June 18th, 1881.

To Jno. Asberry, Civil Sheriff of the parish of East Carroll, Lake Providence, La :

Sir—You are hereby notified that in the case of E. E. Norton, Assignee, vs. Govy Hood et als., No. 11,414, of the U. S. District Court for the Eastern District of Louisiana, the complainant, E. E. Norton, Assignee, claims the benefit of an appeal from the final decree rendered in said cause, on the 13th day June, 1881, and that he has this day obtained an order for such appeal, and has filed his bond in accordance with said order.

Respectfully,

W. G. WYLY,
J. D. ROUSE,
E. H. FARRAR,
Solicitors for Comp.

A true copy.

Received the within notice of appeal, of which this copy was made by me, on Wednesday, the 22d day of June, A. D. 1881, and on Thursday, the 23d day of same month and year, I served same by handing to John Asberry, ex-Sheriff in person at his residence in the parish of East Carroll, La.

(Signed) A. G. BELDEN.

Personally appeared before me the undersigned authority, A. G. Belden, who being sworn says, that the above return was made in accordance to the facts therein related.

Sworn to and subscribed before me this 24th day of June, A. D. 1881.

[Seal.] (Signed) F. H. G. TAYLOR,
Deputy Clerk Eighth District Court, Parish of East Carroll, La.

Notice to Govy Hood, Esq.

LAKE PROVIDENCE, La., June 18th, 1881.

To Govy Hood, Esq., Lake Providence, La. :

Sir—You are hereby notified that in the case of E. E. Norton, Assignee, vs. Govy Hood et als., No. 11,414 of the U. S. District Court for the Eastern District of Louisiana, the complainant, E. E. Norton, Assignee, claims the benefit of an appeal from the final decree rendered in said case, on the 13th day of June, 1881, and that he

*Notices of appeal to John Asberry, Civil Sheriff of the parish of East Carroll; to Govy Hood and to M. S. Powell, Civil Sheriff of the parish of East Carroll and successor to Jno. Asberry, late sheriff of said parish annexed to the foregoing Transcript of Appeal.

has this day obtained an order for such an appeal, and has filed his bond in accordance with said order.

Respectfully,
W. G. WYLY,
J. D. ROUSE,
E. H. FARRAR,
Sol'rs for Compl't.

A true copy.

Received the original notice of appeal, of which this is a true and correct copy made by me, on Wednesday, the 22d day of June, A. D. 1881, and on the 23d day of the same month and year, I served a copy of the same, by handing the same to William Smiley, a person apparently above the age of fourteen years, in person, who was at and residing at the residence of Govy Hood, in the Parish of East Carroll, Louisiana, the said Govy Hood being absent from home at the time of said service.

A. G. BELDEN.

Personally appeared before me, the undersigned authority, A. G. Belden, who, being sworn, says, that the above is a true statement of facts as to time and service as related therein.

Sworn to and subscribed before me this 24th day of June, 1881.
[Seal] (Signed) F. H. G. TAYLOR,
Deputy Clerk Eighth District Court, Parish of East Carroll, La.

Notice to M. S. Powell.

LAKE PROVIDENCE, La., June 18, 1881.

To M. S. Powell, Civil Sheriff of Parish of East Carroll, and successor to John Asberry, late Sheriff of said Parish:

Sir—You are hereby notified that in the case of E. E. Norton, Assignee, vs. Govy Hood et als., No. 11,414 of the United States District Court for the Eastern District of Louisiana, the complainant, E. E. Norton, Assignee, claims the benefit of an appeal from the final decree rendered in said cause on 13th day of June, 1881, and that he has this day obtained an order for such appeal, and has filed his bond in accordance with said order.

Respectfully,
W. G. WYLY,
J. D. ROUSE,
E. H. FARRAR,
Sol's for Compl't.

A true copy.

Received the original notice of appeal, of which the within is a true and correct copy made by me, on Wednesday, the 22d day of June, A. D. 1881, and on Thursday, the 23d day of the same month and year, I served the same on M. S. Powell, Sheriff of the Parish

of East Carroll, La., and successor to John Asberry, late Sheriff of said parish and State; said service was made on said Powell, in person, by me, by handing the same to him in the town of Lake Providence, East Carroll, La., on said 23d day of June, 1881.

(Signed) A. G. BELDEN.

Personally appeared before me, the undersigned authority, A. G. Belden, who, being sworn, says: That the above service was made at the time and in the manner as above set forth.

(Signed) A. G. BELDEN.

Sworn to and subscribed before me this 24th day of June, 1881.

[SEAL.] (Signed) F. H. G. TAYLOR,
Deputy Clerk 8th Dist. Court, Par. of East Carroll, La.

Citation of Appeal.—Issued June 22d, 1881. Annexed to the above Transcript.

E. E. NORTON, Assignee,	No. 11,414.
vs.	U. S. District Court,
GOVY HOOD *et als.*	East'n Dist. of La.

The United States of America: To Henry Frellsen, defendant, greeting:

You are hereby cited and admonished to be and appear before the Circuit Court of the United States for the Fifth Circuit and Eastern District of Louisiana at its next term to be holden at the city of New Orleans, State of Louisiana, to answer the appeal taken by complainant in this cause, and that you show cause, then and there, if any there be, why the judgment rendered against the said complainant should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Edward C. Billings, Judge, this 22d June, in the year of our Lord 1881, and the 105th of the American Independence.

[SEAL.] (Signed) EDWARD C. BILLINGS,
Judge.

Marshal's Return Thereon.

Received by the U. S. Marshal, June 22d, 1881, and on the same day, month and year I served a true copy of the within citation of appeal on Henry Frellsen, the person herein named, by handing the same to him in person in the city of New Orleans.

(Signed) E. S. CURRY,
Deputy U. S. Marshal.

Order: Extending Time to File Transcript. Extract from the Minutes, April Term, 1881.

New Orleans, Saturday, July 2d, 1881. Court met pursuant to adjournment. Present: Hon. Don A. Pardee, Circuit Judge.

E. E. NORTON, Assignee, vs. GOVY HOOD *et als.* } No. 9551.

On motion of E. H. Farrar and J. D. Rouse, solicitors for complainant, suggesting that in a suit in equity entitled as above and numbered 11,414 on the docket of the District Court of the United States for the Eastern District of Louisiana, a final decree has been made against the complainant from which he has taken an appeal to this Honorable Court and given bond as required by law and the order of said Court, and further suggesting that the record of the proceedings in said case is so voluminous that the transcript thereof cannot be made within ten days, as appears by the certificate of the clerk (hereto annexed). It is ordered that the said complainant have time until the first Monday of November next to file said transcript of appeal herein.

Hearing and Submission of Cause—Extracts from the Minutes—April Term, 1882.

New Orleans, Tuesday, May 2d, 1882. Court met pursuant to adjournment. Present: Hon. Don A. Pardee, Circuit Judge.

E. E. NORTON, Assignee, vs. GOVY HOOD *et al.* } No. 9551.

This cause came on to be heard on the motion of the defendant, Henry Frellsen, Appellee, to dismiss the appeal herein for want of jurisdiction, and was argued by the counsel for the parties respectively and submitted. When the Court took time to consider.

Decree—Extract from Judgment Book.

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana.

April Term, 1882—New Orleans, Saturday, May 27th, 1882. Court met pursuant to adjournment. Present: Hon Don. A. Pardee, Circuit Judge.

E. E. NORTON, Assignee, vs. GOVY HOOD *et al.* } No. 9551.

This cause came on to be heard on the motion of the defendant, Henry Frellsen, Appellee, to dismiss the appeal herein, and was argued by counsel.

On consideration whereof, it is ordered, adjudged and decreed, that the appeal herein be and the same is hereby dismissed with costs.

Decree rendered May 27th, 1882.

Decree signed June 1st, 1882.

(Signed) DON A. PARDEE, *Judge.*

United States of America, Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana.

CLERK'S OFFICE.—I, Francis A. Woolfley, Clerk of the Circuit Court of the United States for the Fifth Circuit and Eastern District of Louisiana, do hereby certify that the foregoing 74 pages contain and form a full, complete, true and perfect transcript of the bill, supplemental bill, order, pro confesso, order setting aside same, demurrer, etc., of Frellsen, replication, hearing and continuance, hearing and submission, decree, appeal, notice of appeal, appeal bond, notices of appeal to Hood *et al.*, citation of appeal and M. R. as the same appears in the transcript of appeal from the United States District Court, and of the order extending time, etc., hearing and submission of cause, and decree in this court, as the same appears on file, and of record in the case of E. E. Norton, Assignee, *vs.* Govy Hood *et als.*, No. 9551 of the docket of the said court.

Witness my hand and the seal of said court, at the city of
[SEAL] New Orleans, this 26th day January, A. D. 1883.

F. A. WOOLFLEY, *Clerk.*

I, Don A. Pardee, United State Judge for Eastern District of Louisiana, do certify that Francis A. Woolfley, whose name is signed to the above certificate as Clerk of the Circuit Court of the United States for the Fifth Circuit and Eastern District of Louisiana, was, at the time of signing said certificate, and is now, the Clerk of said Court; that said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand, at the city of New Orleans, in said district, this 26th day of January, A. D. 1883.

DON A. PARDEE, *Judge.*

ANSWER OF THE CIRCUIT JUDGE TO THE PETITION FOR MANDAMUS.

SUPREME COURT OF THE UNITED STATES.

In the Matter of the Petition of Emery E. Norton.

ANSWER TO THE PETITION.

Without any consideration of the matters of fact stated in the petition or admission thereof as stated, except as hereafter set forth, the respondent says:

There was a motion submitted to the Circuit Court of the United

States, in New Orleans, to dismiss an appeal taken by the said Norton, in the District Court of the United States, in a suit wherein he was plaintiff, and Henry Frellsen, Govy Hood and the Sheriff of Carroll parish were appellees and defendants.

That after argument the motion submitted was sustained, and the appeal was dismissed and no further action has been had in the cause, in the Circuit Court. This decree was made at the April term, A. D. 1882, and bears date the 27th day of May, A. D. 1882.

The opinion of the court was that the appeal was improvidently taken for the reason that the decree was not a final decree within the terms of the 631st section of the Statutes of the United States.

The decree of the District Court dissolved an injunction granted in that court, in that cause, upon proceedings between Frellsen and Hood in the State Court, in Carroll parish, and allowed the Sheriff to obey the order issued from the State Court to make a sale of the property in his possession.

But the decree does not dismiss the bill as to either of the parties, nor withdraw its control over the parties before it and contemplated action after the return of the Sheriff, and made no order as to costs.

The Circuit Court was of opinion that until the District Court had disposed of the cause finally, that the Circuit Court could not satisfactorily or legally determine it. For that cause it sustained the motion.

DON A. PARDEE,
Circuit Judge.

Respectfully submitting to the orders and decrees of the Court, respondent asks to be dismissed without day.

108-237

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1882.

ORIGINAL NO. 10 orgl.

EX PARTE EMERY E. NORTON.

BRIEF ON BEHALF OF PETITIONER.

J. D. ROUSE,
Counsel for Petitioner.

City Item Print, 39 Natchez street.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1882.

No. —.

EX PARTE EMERY E. NORTON.

BRIEF ON APPLICATION FOR MANDAMUS.

STATEMENT OF THE CASE.

The petition for mandamus herein shows that the petitioner, in his capacity as assignee of Govy Hood, a bankrupt, brought a bill in equity in the District Court of the United States for the District of Louisiana against said Hood, Henry Frellsen and another to recover certain real estate which he alleged belonged to said bankrupt at the time of his adjudication as such, but which he fraudulently concealed with the aid and collusion of said Frellsen, who reconveyed the same to said Hood after his discharge in bankruptcy.

At the time the bill was filed the property was about to be sold by the Sheriff of the parish where it was situated under executory process at the suit of Frellsen against Hood, foreclosing a mortgage granted by Hood to Frellsen at the time of the reconveyance

to him aforesaid. The Sheriff was made a defendant and enjoined *pendente lite* from selling under his writ.

Frellsen answered, denying the fraud and asserting the validity of the proceedings under which the title to Hood's property became apparently vested in him just before Hood voluntarily petitioned to be adjudged bankrupt.

Issue was joined, testimony taken, and the cause brought to a hearing in the District Court upon the pleadings, exhibits and evidence, and thereupon it was decreed that Frellsen had not been guilty of any fraud, but that he had acquired title to Hood's property under valid proceedings, discharged from any claim of the plaintiff. The injunction was dissolved and the Sheriff authorized to proceed in the execution of his writ. It was also decreed that any surplus proceeds arising from the sale by the Sheriff after paying Frellsen's claim should not be paid to Hood, but should be paid to the complainant. The decree also granted leave to the complainant to apply for orders regulating the sale, and reserved the question of costs.

Petitioner declined to apply for any such orders and appealed from the decree to the Circuit Court. Motion was there made to dismiss his appeal for want of jurisdiction in said court, upon the ground that the decree was not a final one, within the meaning of the statute providing for appeals in such case. The motion was sustained and the appeal dismissed. (See petition, R., pp. 1–5.)

The petitioner now applies to this Court for a writ of mandamus to compel the Circuit Court to reinstate said cause, and to hear and determine the same.

The answer of the Hon. Don A. Pardee, Circuit Judge, affirms the correctness of his refusal to entertain jurisdiction of said appeal because the said decree was not a final one. Rec. p. 31.

ARGUMENT.

I.

Except for the ability of the counsel who moved to dismiss the appeal, and of the judge who sustained the motion, we would suppose that the *finality* of the decree of the District Court was unquestionable.

Still it does not seem difficult to show, that said decree is a final one in the sense of the statutes authorizing appeals from final

decrees in like causes. A consideration of the decisions as to what a final decree is, in connection with the decree itself, will readily lead to a correct conclusion upon the question.

A *final decree* is one which disposes of the *controversy* between the parties.

The leading case upon this subject is *Forgay vs. Conrad*, 6 How., 201. This court there said, "When the decree decides the right to "the property in contest, and directs it to be delivered up by the "defendant to the complainant, or directs it to be sold, or directs the "defendant to pay a certain sum of money to the complainant, and "the complainant is entitled to have such decree carried imme-"diately into execution, the decree must be regarded as a final one "to that extent, and authorizes an appeal to this court, although so "much of the bill is retained in the Circuit Court as is necessary "for the purpose of adjusting by a further decree the accounts "between the parties pursuant to the decree passed."

In *Thompson vs. Dean*, 7 Wall., 342, this language is repeated and affirmed and declared to be the rule upon the subject and "a "sound construction of the acts of Congress relating to appeals," and sustained by the authority of several decisions which are cited.

Let us apply the rule to this case. The bill was brought to recover certain real estate alleged to have been fraudulently concealed by the bankrupt at the time of his adjudication with the collusive aid of Frellsen, who reconveyed to the bankrupt after his discharge. Frellsen answered, denying the fraud and asserting the validity of his title. Issue was joined upon the answer, evidence taken and the cause heard upon the bill, answer, replication, exhibits and evidence, and the decree in question was thereupon made. And what is it?

First, it is decreed "that the judgment in favor of Henry Frell-"sen against Govy Hood in the Parish of Carroll in the year 1866 "and the executions thereunder in 1868, with the sales and convey-"ances by the Sheriff, as shown in the record, have been established "as valid and operative, and that no fraud, collusion nor malprac-"tice is established against him; that these proceedings *entitle "him to the property so conveyed to him, discharged from any "claim from the plaintiff in this suit.*"

This determined all the issues between Norton and Frellsen in favor of the latter. It disposed of the controversy between them.

In the language of Chief Justice Taney in *Forgay vs. Conrad supra:* "It decided the right to the property in contest."

Second, the decree provides, "that whatever surplus may arise "from the sale of the property under the process in favor of Frell- "sen from the District Court of East Carroll Parish * * * * "*shall not be paid to the said Hood, but shall be paid to the com-* "*plainant as assignee.*"

This *finally* disposes of Hood's right to such surplus, and awards the same to the complainant. It directs that it (the surplus) "be "delivered up to the complainant," in the language of *Forgay vs. Conrad.*

The subsequent clause of the decree, which requires the Sheriff to "dispose of the surplus under the direction of the court," means simply that he shall pay it over to the complainant in accordance with the "direction of the court," already made above. It is not to be presumed that the court, having already decreed the payment of the surplus to the complainant, would, or intended to make, or reserve the right to make, any other disposition thereof.

The decree further grants leave to complainant to apply for orders regulating the sale, etc.; but as the complainant sought to recover the property and not to regulate the sale thereof, he declined to consent thereto, and appealed from the decree, which determined his claim against him. Surely it will not be contended that the decree lacks *finality*, because the complainant was granted leave, *to submit to it, and to ask orders regulating its execution.*

The case of the petitioner is analogous to *Forgay vs. Conrad.* In that case the object of the bill was to set aside certain conveyances as fraudulent, to recover the property, and to obtain an account of the rents and profits thereof. This also was the object of the petitioner's bill. The only difference between the two cases is, that in petitioner's case the decree was against him, and in the former case the complainant recovered.

The case of the *Railroad Company vs. Bradleys*, 7 Wall., 575, is also in point. The Railroad Company filed a bill to enjoin the sale of certain property, and obtained an injunction *pendente lite.* Subsequently, after various proceedings a decree was entered, which ordered that the injunction be dissolved, and directed a sale by "the "trustees, of the property in controversy, according to the deed of

" trust, *and the bringing of the proceeds into court* TO ABIDE FUR-
" THER ORDERS."

On motion to dismiss an appeal from this decree, it was held to be final, and the motion was denied.

In *Stovall vs. Banks*, 10 Wall., 587, the decree was held to be final where much more was left to be done, subsequent to its entry, than in petitioner's case.

In *Huntington et al vs. Consolidated Association of Planters, etc.*, (decided by this court, in January, 1880, but not reported), by the decree the receivers in the cause were " discharged from being such " receivers, *upon passing their final account, and paying the bal-* " *ance of the money that* MAY BE *found due*, less such COSTS as shall " be taxed and allowed by the court to the president, etc., of the " Association, and *delivering* into their possession all property, etc," and various other things remained to be done, by the decree, which required further action of the court.

Huntington appealed, and the appellees moved to dismiss the appeal upon various grounds, one of which was that the decree was not *final*. This Court denied the motion.

It was suggested at the hearing of the motion below that it would be necessary to determine the amount due Frellsen, in order to determine what surplus, if any, remained from the proceeds of the sale to be paid over to complainant, and that for that reason the decree was not final.

There is no force in the suggestion, because Frellsen was proceeding under executory process, the foundation of which was a judgment fixing the amount due him. The decree determined his right to enforce his writ and necessarily decided that he was entitled to the fixed sum named in it; hence no further action is required to ascertain the amount due him or the surplus after his payment.

And if there were, it would not detract from the finality of the decree, because an accounting is required. *Whiting et al. vs. Bank of United States*, 13 Peters, 15; *Ray vs. Law*, 3 Cranch, 179.

It was contended upon the argument of the motion in the court below that the decree is not a final one, because it does not in terms dismiss the bill. The precise form of a decree is not sacramental. As already shown, to render a decree final, it is enough if it decide the controversy between the parties. It has been held by this

Court that "if, by any direction, the entire cause is, in fact, determined, the decision, when reduced to form and entered in the records of the Court, constitutes a final judgment, subject in a proper case to our review, whatever may be its technical designation." *Commissioners vs. Lucas*, 93 U. S., 113.

The authorities cited demonstrate that the decree under consideration is a final one. It was certainly so considered by his Honor the district judge; otherwise he would not have allowed the appeal therefrom.

II.

The petitioner is without remedy in the premises, except by the aid of this court; and it is now well settled that where, on an appeal from the District to the Circuit Court, the latter court, without considering the exceptions or errors assigned, dismisses the cause for want of jurisdiction, mandamus, and not error or appeal, is the proper remedy. *Insurance Company vs. Comstock*, 16 Wallace, 258; *Railroad Company vs. Wiswell*, 23 Wallace, 507; *ex parte Heard*, 105 U. S. Rep., 578; *ex parte* Bradstreet, 7 Pet., 633.

This court said, in *ex parte Russell* (13 Wallace, 670), "when "a court declines to hear a case or motion, alleging its incompe- "tency to do so, or that of the party to be heard, mandamus is the "proper remedy. A writ of error or appeal does not lie; for "what has the appellate court to review, when the inferior court "has not decided the case, but has refused to hear it."

As the circuit judge has submitted his answer with the petition a peremptory writ of mandamus should issue in the first instance, in accordance with the prayer of the petition.

Respectfully submitted,

J. D. ROUSE,
Counsel for Petitioner.

March, 1883.

108-237

No. 10 or 92.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1882.

EX PARTE EMERY E. NORTON.

BRIEF IN OPPOSITION TO THE ALLOWANCE OF A MANDAMUS.

JOHN A. CAMPBELL,
For Respondent.

A. W. Hyatt, Print, 73 Camp St. N. O.—24,791

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1882.

EX PARTE EMERY E. NORTON.

BRIEF IN OPPOSITION TO THE ALLOWANCE OF A MANDAMUS.

STATEMENT OF THE CASE.

I.

Govey Hood confessed a judgment in favor of Henry Frellsen, in the District Court of Carroll parish, Louisiana, for $39,319, principal, and for $10,102 63 accrued interest, being for $49,421 63 due the 13th February, 1866, the date of the judgment, with a stay of execution in case the debtor punctually paid an installment, with interest, every year for five years, without any default. Hood paid nothing on this judgment in 1866, 1867 and 1868. In July, 1868, execution was issued, and the plantations of Hood were seized in that month, and, after appraisement and advertisement, were sold 5th September, 1868, and Frellson was the purchaser of the plantations, and obtained a deed and delivery from the Sheriff of Carroll.

On the 26th of October, 1868, Frellsen signed a unilateral agreement with Govey Hood, dated 26th October, 1868, in which he recites the facts, and stipulates and promises that he will sell to Hood the plantations he had purchased at the sheriff's sale, for the amount of the judgment, less an amount to be credited, upon condition that the sum of $7000 were to be paid 15th December, and $8000 successively for four years, and the remainder in the fifth year. In case of payment of $7000 and the costs, Frellson was to give a lease for a year, and if he paid the installments successively this lease was to be succesively renewed. The failure

to pay the first installment was to be a release and discharge from the agreement, and Frellsen was not to have a claim of any sort. Hood made no covenant at all, in return, to buy or pay.

Hood failed to pay, in December, any part of the sum, and was declared a bankrupt, on his own application, in January, 1869. Hood was discharged, as a bankrupt, in the year 1871. After his discharge, Frellsen sold to Hood those plantations which he had not previously sold. He stated his account with Hood, crediting all he had received from prior sales, and took from him (Hood) six notes for six annual installments, and a mortgage on the property thus sold for the notes, with interest at eight per cent. till paid. Hood paid nothing during four years, and executory process was sued out in Carroll parish, in the District Court in 1875, and seizure took place under this writ.

Hood obtained an injunction, and a litigation between Hood and Frellsen continued until 1879. The Supreme Court of Louisiana dismissed Hood's petition in 1879. Hood vs. Frellsen, 31 An. 577.

Very shortly after this decision Norton filed this bill in the District Court of the United States in July, 1879, about ten years from the date of Hood's bankruptcy, and obtained an injunction, requiring the sheriff of Carroll parish to suspend the execution of the executory process in his hands, and to abide the order of the District Court of the United States. Record, p. 14. This suit continued in the District Court until May, 1881, and was submitted to that court on pleadings and proofs. Rec. 24, 25.

The court, after disposing of exceptions to testimony, made a declaration that the judgment confessed in February, 1866, by Hood, and the sale made in 1868 by the sheriff, and the purchase by Frellsen, as shown, were unaffected by fraud, collusion or malpractice, and divested the title of Hood, and that by the subsequent bankruptcy of Hood, Norton acquired no title. The court dissolved the injunction, which had been granted by the

court in 1879, when the suit commenced, and directed the sheriff of Carroll, a party to the bill, to sell under the writ in his hands since 1875 from the District Court of the Parish of Carroll.

The defendant, Hood, had allowed the bill of Norton to be taken pro confesso.

He had admitted that his purposes were criminally fraudulent, and the court decreed that all the interest he had acquired was subject to the claim of creditors.

The court directed that the sale by the sheriff should be conducted under the directions of the United States Court, and that any surplus in his hands should be disposed of by a subsequent decree of the court.

Leave was given to the plaintiff to apply for directions in respect to the sale, and the sheriff was to make his return to the District Court of his sale, and the question of costs was reserved.

An appeal was taken from this decree to the Circuit Court.

The appeal was granted the 18th June, 1881. It was returnable to the Circuit Court, to be held in November, 1881. It was not a suspensive appeal, so that it was quite probable, if not certain, that the sale directed by the decree would be made before the session of the Circuit Court of the United States in November.

This appeal was heard in May, 1882, and since that date no proceedings of any sort have been taken in the Circuit Court, relative to this case, until this proceeding was taken. The appeal was dismissed.

II.

The motion submitted to the Circuit Court was, that this decree was not a final decree, within the meaning of the article 631 of the Revised Statutes, Record 31, 32. Unless the decree of the District Court be final, an appeal is not authorized, and this exc. p-

tion may be made in the Supreme Court if the case shall reach that court.

Mordecai vs. Lindsay, 19 How. 199.
Montgomery vs. Anderson, 11 How. 386.

III.

In this case the District Court dissolved the injunction which it had allowed to the plaintiff to operate upon a suit in the District Court of Carroll parish, between Frellsen and Hood, and which had been pending these several years, this plaintiff never having been a party, and that suit was, upon contracts, posterior to the discharge of Hood from bankruptcy. The mere dissolution of this injunction is not the subject of revision in any court on appeal.

Verden vs. Caseman, 18 How. 86.
Ex parte Schwab, 98 U. S. 240.
Buffington vs. Harvey, 5 O. 99.

IV.

The retention of control over the Sheriff of Carroll parish, the directions in respect to the sale and the distribution of the price, and the reservation of the subject of costs and the avoidance of a decree to dismiss the bill against Frellsen, furnish satisfactory evidence that the District Court had not designed to make a final decree at this date.

Bebee vs. Russell, 19 H. 284.
Barnard vs. Gibson, 7 How. 653.
Cushing vs. Laird, 15 Blatch. 219, 236-8.

V.

The Judge of the Circuit Court in May, 1882, dismissed the appeal, because the decree of the District Court was not a final decree.

The question whether a decree be final or interlocutory

is a judicial question, sometimes of difficulty, and requiring discrimination and judgment to decide. The record shows that the decision was rendered after argument and deliberation, and that the judgment has been acquiesced in for the remainder of the term in the Circuit Court in 1882, and until the early part of this year, when notice was given of this motion.

The question whether a court can exercise jurisdiction under the Constitution or laws, continually arises either upon a motion, a plea, a demurrer, or an appeal or writ of error. It is involved in every judicial act. It has not been considered that when the decision has been made in court after argument, and that judgment recorded, that the court can be ordered to justify its judgment, and that the litigation should be conducted between the plaintiff and the judge.

The authorities seem to be to the contrary of this. No mandamus is allowable. Newman's case, 14 Wallace, 152, 165; High on Extraordinary Remedies, §§ 188, 189, 190; The State vs. Morgan, 12 La. 118.

JOHN A. CAMPBELL,
For Respondent.